TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 38

SUN OIL COMPANY, PETITIONER,

vs.

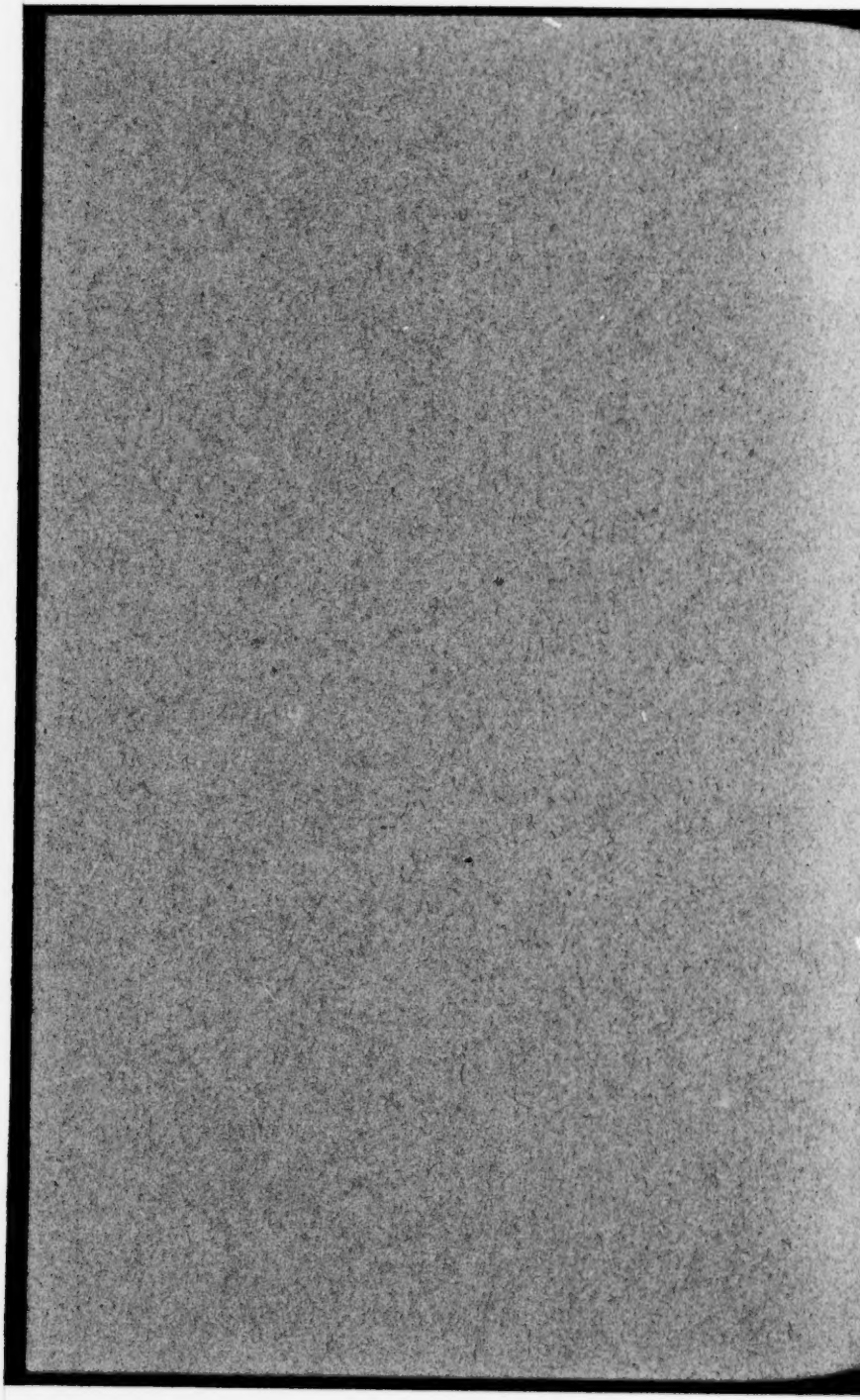
DALZELL TOWING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 14, 1932

CERTIORARI GRANTED MAY 23, 1932

(36,688)



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IN UNITED STATES DISTRICT COURT

SUN OIL COMPANY, Libelant,

against

DALZELL TOWING COMPANY, INC., Respondent

DOCKET ENTRIES

1926.
Oct. 19. Libel filed.
1927.
May 18. Answers filed.
Nov. 1. Amended answers filed.
1929.
Dec. 27. Order substituting proctors for respondent.
1930.
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1931.
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Feb. 17. Final decree entered.
Apr. 20. Notice of appeal, with allowance, filed.
Apr. 20. Assignments of error filed.
Apr. 22. Appeal bond filed.

[fol. 2] IN UNITED STATES DISTRICT COURT

LIBEL

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The libel of Sun Oil Company vs. Dalzell Towing Company, Inc., and against the steamtugs "Dalzellite", "W. F. Dalzell", and "Fred. B. Dalzell, Jr.", their engines, boilers, tackle and apparel, etc., and against all parties intervening for their interest therein, in a cause of stranding, civil and maritime, respectfully alleges:

First. Libelant is a corporation organized and existing under and by virtue of the laws of the State of New Jersey

and at the time hereinafter mentioned was, and still is, the owner of the SS. "Sabine Sun".

Second. The SS. "Sabine Sun" is a large and valuable tank steamer about 429 ft. long, 59 ft. in beam and 4,083 net tons, engaged in the oil trade between Texas ports and ports on the Atlantic Coast of the United States. Up to the time of the stranding hereinafter referred to, the said steamship was tight, staunch, strong and seaworthy and in all respects properly manned and equipped.

Third. The respondent is a corporation organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at No. 21 State Street, Borough of Manhattan, City of New York, and at the time hereinafter referred to owned and/or operated the steamtugs "Dalzellite", "W. F. Dalzell" and "Fred. B. Dalzell, Jr."

[fol. 3] Fourth. The said steamtugs "Dalzellite", "W. F. Dalzell", and "Fred B. Dalzell, Jr.", are now or during the pendency of process herein will be within the jurisdiction of this Honorable Court.

Fifth. On information and belief the facts of the stranding are as follows:

On or about May 15, 1925, the respondent herein entered into an oral contract with the libelant to tow the SS. "Sabine Sun" from an anchorage off Stapleton, Staten Island, to the docks of the Texas Oil Company at Bergen Point, Bayonne, New Jersey. The weather was clear, the tide was flood and the wind was light from the south. The SS. "Sabine Sun" was laden with a cargo of fuel oil consigned to the Texas Oil Company and at the time in question had a maximum draught of twenty-four feet. In pursuance of the contract mentioned, respondent furnished the three tugs named to do the towing and also furnished a pilot who went aboard the bridge of the "Sabine Sun" and who was in complete and sole charge of the navigation, operation and maneuvering of the tow. Two of the tugs were stationed on either quarter and the third was forward on the port side.

At about 3:30 P. M., Daylight Saving Time, while the SS. "Sabine Sun", in tow of the said tugs and under the sole control of respondent's pilot, was making a turn from the

Kill von Kull into Newark Bay, she was negligently caused to strand on the bottom in shallow water outside the regular dredged ship channel. The SS. "Sabine Sun" lay aground for three hours and was finally freed only after a [fol. 4] portion of her cargo had been lightered. As a result of the stranding the shell plates in several of the lower strakes forward were fractured and distorted, some of the keel plates were buckled and considerable other damage was done to the under-water portion of the vessel.

Sixth. The aforesaid stranding was caused through no fault or negligence on the part of the SS. "Sabine Sun" or her owners or crew but was caused wholly and due solely to the fault and negligence of the respondent Dalzell Towing Company, Inc., and the tugs "Dalzellite", "W. F. Dalzell" and "Fred B. Balzell, Jr.", in the following particulars, among other-, which will be pointed out at the trial of this suit:

As to the Respondent, Dalzell Towing Company, Inc.

In that the Dalzell Towing Company, Inc. furnished a pilot by reason of whose negligence in not giving proper directions to the tugs "Dalzellite", "W. F. Dalzell" and "Fred B. Dalzell, Jr.", and in not keeping the SS. "Sabine Sun" under proper control, the stranding was due.

As to the Tugs "Dalzellite", "W. F. Dalzell", and "Fred B. Dalzell, Jr."

1. In that they were carelessly and negligently navigated.

2. In that they were not properly manned and equipped.

3. In that they failed to make due allowance for the tide.

[fol. 5] 4. In that they did not keep the "Sabine Sun" under proper control.

5. In that they failed to keep the "Sabine Sun" in the ship channel and permitted that vessel to strand in shallow water, a duly charted obstruction.

Seventh. By reason of the premises, the libellant has sustained damages in the sum of approximately Twenty-five Thousand ($25,000) Dollars, as nearly as can be estimated

at the present time, no part of which has been paid although payment has been demanded.

Eighth. All and singular the premises are true and within the Admiralty and maritime jurisdiction of this Honorable Court.

Wherefore libelant prays that process in due form of law according to the rules and practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the said steamtugs "Dalzellite," "W. F. Dalzell" and "Fred. B. Dalzell, Jr.", their engines, boilers, etc., and that all persons interested therein may be cited to appear and make answer on oath to all and singular the matters aforementioned; and that citation in due form of law may issue against the respondent, Dalzell Towing Company, Inc., and that said company may be cited to appear and make answer on oath to the matters aforesaid; and that this Court will decree the payment by the said respondent to the libelant of the sum of Twenty-five thousand ($25,000) Dollars, together with interest and costs and that the said steamtugs "Dalzellite", "W. F. Dalzell" and "Fred. B. Dalzell, Jr." may be condemned and sold to pay the same and [fol. 6] that libelant may be given such other and further relief as may be just in the premises.

Duncan & Mount, Proctors for Libelant. Office & Post Office Address: 27 William Street, Borough of Manhattan, City of New York.

Duly sworn to by Frank Cross. Jurat omitted in printing.

[fol. 7] IN UNITED STATES DISTRICT COURT

AMENDED ANSWER OF RESPONDENT

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The amended answer of Dalzell Towing Company, Inc., to the libel of Sun Oil Company in a cause of stranding, civil and maritime, alleges:

First. Respondent denies any knowledge or information sufficient to form a belief as to the allegations of the first article of the libel.

Second. Respondent denies any knowledge or information sufficient to form a belief as to the allegations of the second article of the libel.

Third. Respondent admits that it is a corporation with an office at No. 21 State Street, Borough of Manhattan, City of New York, and denies the other allegations of the third article of the libel.

Fourth. Respondent admits the allegations of the fourth article of the libel.

Fifth. Respondent admits that on May 15, 1925, at the time of the stranding hereinafter mentioned the weather was clear, tide last of the flood, and wind light southerly; that respondent furnished three tugs to assist the "Sabine Sun"; that two of the tugs were stationed on either quarter, and a third was forward on the port side; that about 3:30 p. m. daylight saving time, the "Sabine Sun" stranded, and that she lay aground for about three hours and was finally freed after a portion of her cargo had been lightered. Respondent denies any knowledge or information sufficient to form a belief as to the cargo with which [fol. 8] the "Sabine Sun" was laden, and to whom that cargo was consigned, and as to the damage sustained as a result of the stranding. Respondent denies the other allegations of the fifth article of the libel.

Sixth. Respondent denies the allegations of the sixth article of the libel.

Seventh. Respondent admits demand and nonpayment, and denies the other allegations of the seventh article of the libel.

Eighth. Respondent admits the admiralty and maritime jurisdiction of this Court, and denies the other allegation of the eighth article of the libel.

Ninth. Further answering, respondent alleges the true facts are as follows:

On May 15, 1925, an order was received by respondent to furnish tugs to assist the "Sabine Sun" under her own steam from Stapleton, Staten Island, to the Texas Oil Company at Bayonne, New Jersey. The tugs "W. F. Dalzell" and the "Dalzellite" arrived alongside of the "Sabine

Sun" at Stapleton, and the master of the "W. F. Dalzell" went aboard the steamer to act as pilot as far as Port Richmond. The steamer got under way and proceeded under her own steam. The flotilla was joined by the tug "Fred B. Dalzell, Jr.", whose master went aboard the steamer and relieved the master of the "W. F. Dalzell" as pilot. Libellant's port superintendent was also on the bridge with the tug master and members of the ship's crew. The superintendent was advised by the master of the "Fred B. Dalzell, Jr.", that because of recent dredging operations [fol. 9] off Bergen Point the channel was not marked and there was no reliable chart of the vicinity; that there was danger of a vessel the size of the "Sabine Sun" stranding, and that the trip involved considerable risk. Libelant's superintendent thereupon agreed to assume the risk, relying upon the master of the "Fred B. Dalzell, Jr." using his best judgment under the circumstances. With this understanding the flotilla proceeded, and while every effort was being made to keep the vessel in the channel, during the turning into Newark Bay the steamer grounded off Bergen Point. As the channel was not marked respondent does not know whether or not the grounding occurred in the channel. A part of the vessel's cargo was lightered, and in about 3 hours she was afloat.

Tenth. Said stranding and consequent damage, if any, were not caused or contributed to by any negligence on the part of respondent, its agents or employees, but were due to inadequate channel markings, the fault and negligence of the libelant and/or to causes unknown to respondent.

Eleventh. Further answering respondent repeats and realleges the matters set forth in articles ninth and tenth of this amended answer, and further alleges that on December 28, 1923, in compliance with libelant's request it sent to libelant a copy of towage rates together with a notice of the conditions under which the towage services would be performed. Said notice provided in part as follows:

"When the captain of any tug engaged in the services of towing a vessel which is making use of her own propelling power goes on board said vessel, it is understood and agreed [fol. 10] that said tugboat captain becomes the servant of the owners in respect to the giving of orders to any of the

tugs engaged in the towage service and in respect to the handling of such vessel, and neither the tugs nor their owners or agents shall be liable for any damage resulting therefrom."

Subsequently, on or about May 15, 1925, libelant's marine superintendent (Turnbull) orally engaged the services of three tugs to assist the "Sabine Sun", by calling respondent's tug dispatcher. At the time of the stranding mentioned in articles ninth and tenth of this amended answer the "Sabine Sun" was making use of her own propelling power, and the captain of steamtug "Fred B. Dalzell, Jr." was on board. At the time of the stranding the tugs were assisting the steamer and the captain of the "Fred B. Dalzell, Jr.," was directing her navigation as servant of the libelant subject to the terms of the aforesaid notice, and by virtue thereof the respondent is not liable for the damage, if any, sustained by the "Sabine Sun".

All and singular the premises are true.

Wherefore respondent prays that the libel herein as against it may be dismissed with costs.

Burlingham, Veeder, Masten & Fearey, Proctors for Respondent.

Duly sworn to by Fred B. Dalzell. Jurat omitted in printing.

[fol. 11] IN UNITED STATES DISTRICT COURT

AMENDED ANSWER OF CLAIMANT

To the Honorable the Judges of the United States District Court for the Southern District of New York.

The amended answer of Fred B. Dalzell, managing owner and claimant of steamtugs "Dalzellite," "W. F. Dalzell," and "Fred B. Dalzell Jr.," as proceeded against upon the libel of Sun Oil Company in a cause of stranding, civil and maritime, alleges:

First. Claimant denies any knowledge or information sufficient to form a belief as to the allegations of the first article of the libel.

Second. Claimant denies any knowledge or information sufficient to form a belief as to the allegations of the second article of the libel.

[fol. 12] Third. Claimant admits respondent is a corporation with an office at No. 21 State Street, Borough of Manhattan, City of New York and denies the other allegations of the third article of the libel.

Fourth. Claimant admits the allegations of the fourth article of the libel.

Fifth. Claimant admits that on May 15, 1925, at the time of the stranding hereinafter mentioned the weather was clear, tide last of the flood, and wind light southerly; that respondent furnished three tugs to assist the "Sabine Sun"; that two of the tugs were stationed on either quarter, and a third was forward on the port side; that about 3:30 p. m. daylight saving time, the "Sabine Sun" stranded, and that she lay aground for about three hours and was finally freed after a portion of her cargo had been lightered. Claimant denies any knowledge or information sufficient to form a belief as to the cargo with which the "Sabine Sun" was laden, and to whom that cargo was consigned, and as to the damage sustained as a result of the stranding. Claimant denies the other allegations of the fifth article of the libel.

Sixth. Claimant denies the allegations of the sixth article of the libel.

Seventh. Claimant admits demand and non-payment, and denies the other allegations of the seventh article of the libel.

Eighth. Claimant admits the admiralty and maritime jurisdiction of this Court, and denies the other allegation of the eighth article of the libel.

Ninth. Further answering, claimant alleges the true facts are as follows:

[fol. 13] On May 15, 1925, three tugs were ordered to assist the "Sabine Sun" under her own steam from Stapleton, Staten Island, to the Texas Oil Company at Bayonne, New Jersey. The tugs "W. F. Dalzell" and the "Dalzellite" arrived alongside of the "Sabine Sun" at Stapleton,

and the master of the "W. F. Dalzell" went aboard the steamer to act as pilot as far as Port Richmond. The steamer got under way and proceeded under her own steam. The flotilla was joined by the tug "Fred B. Dalzell, Jr.," whose master went aboard the steamer and relieved the master of the "W. F. Dalzell" as pilot. Libelant's port superintendent was also on the bridge with the tug master and members of the ship's crew. The superintendent was advised by the master of the "Fred B. Dalzell, Jr.," that because of recent dredging operations off Bergen Point the channel was not marked and there was no reliable chart of the vicinity; that there was danger of a vessel the size of the "Sabine Sun" stranding, and that the trip involved considerable risk. Libelant's superintendent thereupon agreed to assume the risk, relying upon the master of the "Fred B. Dalzell, Jr.," using his best judgment under the circumstances. With this understanding the flotilla proceeded, and while every effort was being made to keep the vessel in the channel, during the turning into Newark Bay the steamer grounded off Bergen Point. As the channel was not marked claimant does not know whether or not the grounding occurred in the channel. A part of the vessel's cargo was lightered, and in about 3 hours she was afloat.

Tenth. Said stranding and consequent damages, if any, were not caused or contributed to by any negligence on the [fol. 14] part of the tugs, "Dalzellite," "W. F. Dalzell" and "Fred B. Dalzell, Jr.," or those in charge of them, but were due to inadequate channel markings, the fault and negligence of the libelant and/or to causes unknown to respondent.

Eleventh. Further answering claimant repeats and realleges the matters set forth in articles ninth and tenth of this answer and further alleges that on December 28, 1923, in compliance with libelant's request, claimant had sent to libelant a copy of towage rates together with a notice of the conditions under which the towage services would be performed. Said notice provided in part as follows:

"When the captain of any tug engaged in the services of towing a vessel which is making use of her own propelling power goes on board said vessel, it is understood and agreed that said tugboat captain becomes the servant of the owners

in respect to the giving of orders to any of the tugs engaged in the towage service and in respect to the handling of such vessel, and neither the tugs nor their owners or agents shall be liable for any damage resulting therefrom."

Subsequently, on or about May 15, 1925, libelant's marine superintendent (Turnbull) orally engaged the services of three tugs to assist the "Sabine Sun," by calling the tug despatcher of claimant's agent. At the time of the stranding mentioned in articles ninth and tenth of this answer the "Sabine Sun" was making use of her own propelling power, and the captain of steamtug "Fred B. Dalzell, Jr.," was on board. At the time of the stranding the tugs were assisting [fol. 15] the steamer and the captain of the "Fred B. Dalzell, Jr.," was directing her navigation as servant of the libelant subject to the terms of the aforesaid notice, and by virtue thereof the tugs "Dalzellite," "W. F. Dalzell" and "Fred B. Dalzell, Jr.," are not liable for the damage, if any, sustained by the "Sabine Sun."

All and singular the premises are true.

Wherefore claimant prays that the libel herein as against the "Dalzellite," "W. F. Dalzell" and "Fred B. Dalzell, Jr.," may be dismissed with costs.

Burlingham, Veeder, Masten & Fearey, Proctors for Claimant.

Duly sworn to by Fred B. Dalzell. Jurat omitted in printing.

[fol. 16] In United States District Court, Southern District of New York

Sun Oil Company, Libelant,

against

Dalzell Towing Company, Inc., and Against the Steamtugs "Dalzellite", "W. F. Dalzell" and "Fred B. Dalzell, Jr.", Their Engines, Boilers, etc.

Order Substituting Proctors for Respondent

Upon the subjoined consent and on motion of Burlingham, Veeder, Fearey, Clark & Hupper, it is

Ordered that Burlingham, Veeder, Fearey, Clark & Hupper be, and they hereby are, substituted in the place and stead of Burlingham, Veeder, Masten & Fearey, as proctors for the Dalzell Towing Company, Inc.

Dated New York, N. Y., Dec. 27, 1929.

Alexander Gilchrist, Jr., Clerk.

We hereby consent to the entry of the foregoing order.
Burlingham, Veeder, Masten & Fearey, Proctors for
Dalzell Towing Company, Inc.

[fol. 17] In United States District Court

[Title omitted]

Before Hon. John C. Knox, U. S. D. J.

Statement of Evidence

New York, February 10, 1930.

Appearances

Duncan & Mount for the Libelant, by Frank A. Bull, Esq.
Burlingham, Veeder, Fearey, Clark & Hupper for Claimant and Respondent, by Chauncey I. Clark, Esq., and P. F. Shortridge, Esq.

Offers in Evidence

Mr. Clark: May I offer the correspondence?

[fol. 18] The Court: Yes.

Mr. Clark: I will start with a letter of April 24, 1923. This was the original letter with this clause, April 24, 1923, sending out the schedule of rates and the contract.

Mr. Bull: I cannot agree to that. Anything you sent to the Sun Oil Company that is a carbon copy I will agree to.

Mr. Clark: We had a list and when you went over it with Mr. Shortridge he showed it to you. This is the beginning, April 24, 1923. It is a letter that we got up at the time in my office, and it was sent out to all the people Dal-

zell did business with, and that list they have. That is number one.

The next was November 15, 1923, correspondence with the Sun Oil Company, Mr. Charles R. Inness, our letter of November 13, 1923, and your reply of November 14, 1923.

Mr. Bull: It apparently was sent, I will admit that, though I have never been able to find my copies.

Mr. Clark: I offer in evidence Sun Oil Company letter of November 14, 1923.

Received and marked Respondent's Exhibit A.

Mr. Clark: I offer in evidence copy of Dalzell Towing Company's letter to the Sun Oil Company, attention of Mr. Inness, in answer to Exhibit A.

Received and marked Respondent's Exhibit B.

[fol. 19] Mr. Clark: I offer in evidence copy of the towage rates and contract which was attached to and enclosed with the letter referred to in the last paragraph, page 1, of the letter, Exhibit B.

Received and marked Respondent's Exhibit C.

Mr. Clark: I offer in evidence copy of bill of Dalzell to the Sun Oil Company referred to in Exhibit B and enclosed therewith.

Received and marked Respondent's Exhibit D.

Mr. Clark: I offer in evidence letter from Sun Oil Company to Dalzell, dated December 27, 1923.

Received and marked Respondent's Exhibit E.

Mr. Clark: I offer in evidence copy of letter from Dalzell to Sun Oil Company, attention of Mr. Newland Carr, dated December 28, 1923, in answer to Exhibit E.

Received and marked Respondent's Exhibit F.

Mr. Clark: I also call attention and wish it to appear in the record of this case, that in the last exhibit (Exhibit F), Dalzell letter to Sun Oil Company, also a copy of the tariff rates contract was enclosed, which is already marked, Exhibit C. I offer in evidence letter from Sun Oil Company to

[fol. 20] Dalzell, June 6, 1924, signed by L. A. Turnbull, Sun Oil Company.

Received and marked Respondent's Exhibit G.

Mr. Clark: I offer in evidence copy of bill to Sun Oil Company, May 29, 1924, which is the bill referred to in the letter marked Exhibit G. If there is any mistake about this, I am willing to have it checked, but I think that I am right about it.

Received and marked Respondent's Exhibit H.

Mr. Clark: I offer in evidence copy of letter from Dalzell to Sun Oil Company, dated June 10, 1924, attention of Mr. Turnbull, in answer to Mr. Turnbull's letter, marked Exhibit F.

Received and marked Respondent's Exhibit I.

Mr. Clark: I also wish it to appear in the record at this point that with this last exhibit, Dalzell's letter marked Exhibit I, was sent again another copy of the towage rates and contract marked Exhibit C. I call attention to the fact that in the upper right-hand corner of the last exhibit, Exhibit I, is marked, "Page 628, 1924", and if there is any question about whether that is so, I think it can be straightened out later, but I think that that is correct. I offer this in evidence.

[fol. 21] Received and marked Respondent's Exhibit J.

Mr. Clark: I think I can satisfy Mr. Bull later about the first letter, April 24, 1923, although it is hardly important. If I can, I will put that in also.

Mr. Bull: It is perfectly all right to leave it open until you can satisfy me.

Counsel state their claims.

Leopold A. Turnbull, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Direct examination.

By Mr. Bull:

Q. With whom were you engaged or employed in May, 1925?

A. The Sun Oil Company.
Q. Where is the Sun Oil Company?
A. Philadelphia.
Q. Is it a partnership, a corporation, or what?
A. It is a corporation.
Q. Where?
A. It is a New Jersey Corporation, but the main office is in Philadelphia.
Q. In what capacity were you working at the time?
A. As assistant marine superintendent.
Q. Where were you stationed?
A. Marcus Hook. That is the marine office.
Q. Did the Sun Oil Company own the Sabine Sun?
A. Yes, sir.
[fol. 22] Q. Do you recall her trip up to the Texas Company dock on May 15, 1925?
A. Yes, sir.
Q. Did you have anything to do with that?
A. Yes, sir.
Q. Will you please tell us what?
A. I had charge of handling the ship to discharge her cargo and to see that the captain had his papers changed, and the stores all ordered, ready for her succeeding voyage.
Q. What do you mean by handling the ship?
A. To order the tugs to take her to the dock.
Q. Did you have anything to do with her navigation?
A. No, sir.
Q. Did you make arrangements for tugs to take her up?
A. Yes, sir.
Q. Where was she at that time?
A. She was on her way to Stapleton; she was not in yet.
Q. When was that?
A. That was on the afternoon of the fourteenth.
Q. How did you make this arrangement?
A. By telephone.
Q. Whom did you telephone to?
A. Dalzell's office. I think either Mr. Sullivan or Mr. Brady.
Q. What did you tell them?
A. That the ship would be there on the following day, and that we were going to lighter the ship to twenty-four feet,

and asked them to take the ship up to the dock and dock her at the Texas Oil Company dock at Bergen Point.

Q. What did they say?

A. They said that they would.

Q. Did they say anything about when they would, or how they would?

A. They told me that they would be ready to take her up about, if I remember rightly, about one-thirty.

[fol. 23] Q. On what day?

A. On the fifteenth.

Q. Did you tell them how many tugs you wanted ?

A. No, sir.

Q. Did they send any tugs?

A. They sent one down to Stapleton when she was at anchor and she proceeded up the channel and another tug met her.

Q. Do you know where that other tug met her?

A. Just off St. George somewhere, I think.

Q. And when the first tug came along, what was the first thing it did?

A. Tied up alongside.

Q. And then what happened?

A. The captain of the towboat came aboard.

Q. Where did he come on board?

A. He came up on the bridge.

Q. Where were you at the time?

A. In the captain's room.

Q. Was anybody else in there?

A. No, sir. The captain was with me.

Q. You and the captain were together?

A. The captain and I were together.

Q. That was when he came on board?

A. Yes, sir.

Q. Did you go out when he got on board?

A. We were notified.

Q. And what did you do then?

A. We went up on the bridge.

Q. Did you see the captain there?

A. Yes, sir.

Q. What was he doing?

A. Giving orders to the mate to lift the anchor.

Q. Before this tug captain came on board, did you ask him to come aboard?

A. No, sir.

Q. Do you know whether the captain did or not?

A. We were in the captain's room when he came aboard.

Q. Then did the captain?

A. No, sir.

[fol. 24] Q. Then what did you and the captain do when you came out and found him giving orders?

A. I stayed on the bridge.

Q. And then you proceeded down until the next tug came alongside?

A. Yes, sir.

Q. Did that tug captain come aboard?

A. No, sir.

Q. What happened after that?

A. Proceeded up the channel to the Kills, where a third tugboat met us, and that captain came aboard.

Q. Who asked him to come aboard, do you know?

A. I don't know.

Q. Did you ask him to?

A. No, sir.

Q. Do you know whether or not the captain asked him to?

A. He did not.

Q. Were you with the captain at the time?

A. Yes, sir.

Q. When he came aboard, what did he do?

A. He took charge of the pilotage.

Q. What happened to the other man that was there?

A. He stayed on board.

Q. The other captain who had been piloting stayed with the new one?

A. Yes, sir.

Q. And the new one took charge of the operations from then on?

A. Yes, sir.

Q. After that, what happened?

A. We proceeded down through the Kill, the new captain giving all orders to the tow boats and the engines.

Q. Just what happened, if anything?

A. Struck bottom somewhere.

Q. Do you remember when you did that?

A. I don't know that I remember the exact time. A little after three sometime I think it was, daylight saving time.

[fol. 25] Q. You would say half past three, quarter past three, or what, about?

A. Well, nearer half past three than three.

Q. What did you do when you struck?

A. I went off the bridge to see what damage was done.

Q. Did you look for damage?

A. I did. I looked and could not find any because the tank was full of water.

Q. What tank?

A. The Number 1, starboard side.

Q. Do you mean that it was full of water before you struck?

A. No, sir.

Q. You mean she was full when you went down and looked at it?

A. It was full when I went down and looked at it.

Q. Do you know the condition of that tank before you struck there?

A. It was empty.

Q. Where had it been emptied?

A. Down at Stapleton, where we had been lightering.

Q. Was there any other damage from that grounding?

A. Yes, in the fore deep tank, and the cofferdam and the number two tank.

Q. Was there any water leaked into number one port?

A. Not at that time, if I remember.

Q. What did you do then?

A. I went and talked to the captain and went ashore with one of the tugs, to get some lighters.

Q. And then where did you go?

A. To the Texas Oil Company dock.

Q. Did you get lighters?

A. Yes, sir.

Q. And brought them back to the ship?

A. Yes, sir.

Q. What did you do with them?

A. Connected them up and lightered the cargo from the forward tanks.

[fol. 26] Q. Was any of the cargo taken out of the forward tanks except what you lightered?

A. The cargo drifted back into the number nine tank.

Q. It ran back by gravity?

A. Yes, sir.

Q. How would it run back by gravity to number nine? Wasn't there oil in there?

A. Yes, but that had been lightered at Stapleton and was below the level of the number two tank.

Q. After that was done, after you got some of it run back to the after tanks, and you lightered some of the forward tanks, were they able to pull her off the rocks?

A. She came off the rocks, yes, sir.

Q. And started off again?

A. And started off again.

Q. And went up to the Texas Company dock?

A. And went up to the Texas Company dock.

Q. You spoke of lightering down at Stapleton?

A. Yes, sir.

Q. Why did you lighter?

A. Because we were advised to by the Texas Oil Company.

Q. What did they tell you?

A. To lighter the ship to twenty-four feet.

Q. Did you see what her draft was before you left Stapleton?

A. Yes, sir.

Q. What was it?

A. Approximately twenty-four feet.

Q. Was it anything over twenty-four feet?

A. It was a little under, if anything.

Q. That would be twenty-three something?

A. Yes, sir.

Q. Now, at the time you called up the Dalzell Company and asked for tugs to get you up and dock you at the Texas Company dock, did you know about any pilotage clause that the Dalzell Company had?

A. No, sir.

[fol. 27] Q. I showed you what has been offered here as Exhibit C for the respondent, which is entitled, "Pro forma towage rates and contract". It has a lot to do with rates, and I note that down on the second sheet, at the very bot-

tom, there is a clause entitled, "Pilotage". Will you tell me whether or not, at the time you engaged these tugs, you knew that they had a clause like that?

A. No, sir.

Q. This second tug captain that came aboard, did you ask him to come aboard?

A. No, sir.

Q. Did the captain?

A. No, sir.

Q. Did you ask him to take over the charge of the ship in place of the other pilot?

A. No, sir.

Q. Nor did the captain?

A. No, sir.

Q. Who was directing the navigation at the time that you struck bottom?

A. The second captain that came aboard.

Cross-examination.

By Mr. Clark:

Q. Mr. Turnbull, you are familiar with these invoices of Dalzell's?

A. Yes, sir.

Q. I show you an invoice which was the subject of some correspondence between you and Dalzell. I think you will find that that invoice is the subject of that correspondence, referring to your letter of November 26, 1924, marked Exhibit G. Do you remember that?

A. Yes, sir.

Q. You see those invoices right along, don't you?

A. Yes, sir.

Q. Here is another one that was the subject of correspondence. This has been marked in evidence, Exhibit D.

A. Yes, sir.

Q. Do you see those right along?

A. At this time I used to see only specials that came in, where there was any question. I never used to see these at all.

[fol. 28] Q. You had charge of the special cases that were taken up?

A. Only when there was any question on the rates.

Q. And in order to write the letter to which you refer, you had to have this before you, did you not?

A. No, sir.

Q. Why not?

A. Because I have never seen one of these.

Q. You have never seen one of those?

A. Not to my knowledge.

Q. You wrote that letter which you hold in your hand, did you not?

A. Yes, sir.

Q. And you received a reply to it?

A. Yes, sir.

Q. That is the reply, dated June 10, 1924?

A. Yes, sir.

Q. There was a towage schedule and contract enclosed with it?

A. That may not have been in the letter when I received it, because the mail is opened in our mailing department, upstairs.

Q. So that you think probably the mail was opened somewhere else, and they did not give you everything that was in the mail; is that it?

A. Possibly.

Q. Just look at the bottom of this invoice there to which you refer in your letter, where you are quarrelling with the invoice. You had that notice before you at the time you wrote the letter. Do you see the clause at the bottom of the invoice?

A. Yes, sir.

Q. What does that say?

A. I have read it.

Q. You have read it?

A. I have read it now, yes, sir. But I never remember reading it before.

Q. This is the first time you have ever heard of it, is it not?

A. I heard of it, but it is the first time I have ever seen it to read it.

Q. But you have written letters to Dalzell taking up with them certain rates?

A. Yes, sir.

[fol. 29] Q. And you had the invoice with you when you wrote the letter?

A. Only one to my knowledge.

Q. And you had the invoice before you at the time?

A. Yes, sir.

Q. And you did not read the invoice?

A. Not the printed matter that was at the bottom.

Q. Who is Mr. Inness?

A. He is a clerk in our marine department in Philadelphia.

Q. And who is Mr. Carr?

A. He is the manager of the office down at Marcus Hook.

Q. He is in charge of Marcus Hook?

A. No, he only has charge of the clerks, of the mail.

Q. He is office manager?

A. That is his title, yes, sir.

Q. Are you sure that you have never seen a document like that before? I refer to Exhibit C.

A. To the best of my knowledge I never saw a copy of that document.

Q. You have never seen one like it?

A. No, not to my knowledge.

Q. How did you familiarize yourself with these rates?

A. I never familiarized myself with the rates.

Q. You did not?

A. No, sir.

Q. Didn't you know anything about what those rates were?

A. I know the Towing Company's rates.

Q. They change from time to time, do they not?

A. I only know what they tell me on the telephone what the rates are.

Q. And that is the only way you ever knew anything about the rates?

A. That is right.

Q. When you wrote that letter of June 6, 1924, to Dalzell, Exhibit G, you had to know something about the rates?

A. That was a question of time.

[fol. 30] Q. And you did not have to know about the rates?

A. No, sir.

Q. When you received this letter from Dalzell,—your letter of June 6, Dalzell's letter June 10,—you read the letter, did you not?

A. I suppose I did. I don't remember it. That was 1924.

Q. In reading the letter, referring to the second paragraph, you will see that in order to explain the charge, they thought it advisable for your information to enclose another letter of their towing schedule rates and contract. Do you notice that?

A. I noticed that, yes, sir.

Q. And did you at that time notice it?

A. I cannot remember that.

Q. So that you do not remember now whether you had the contract then or not?

A. No, sir.

Q. You don't remember?

A. I don't remember.

Q. You may have had it and can't remember now?

A. No, sir.

Q. Your answer, "No, sir", means that you cannot remember whether you had the contract before you at that time; is that right?

A. That is right.

Q. Do you want us to believe that you had never seen what is usually termed the pilotage clause which is at the bottom of the invoice?

A. I would not say that I had never seen it, but I will say that I never read it.

Q. Before you told me that you had never seen it, but that you had heard of it. Now, just what do you mean when you say now that you would not say you had not seen it, but that you had not read it? Do you mean that having seen this pilotage clause, and being an assistant superin- [fol. 31] tendent of the Sun Company, that not seeing it was better than not reading it, and you avoided reading it?

A. No, sir.

Q. What do you mean? You said you had heard of it, and I think you said you had not seen it. Now you say you may have seen it but did not read it. When did you see it and not read it?

A. When I O. K.'d that bill, when that letter was written.

Q. You think that perhaps you did see it at that time?

A. Yes, sir.

Q. Was it not part of your job to know what was going on as assistant marine superintendent, knowing what the rates were, and the conditions of the towage rates? Wasn't that part of your job?

A. Yes, sir, but any contracts that were made would not be made through me.

Q. Who would they be made through?

A. Through our Philadelphia office, or our manager, Mr. Duke, who was the manager of the department at that time.

Q. When you were assistant marine superintendent and had received correspondence, and had this correspondence with reference to rates, when the contract had this clause on, did you consider taking it up with anybody else?

A. No, sir.

Q. Why not?

A. Because that was not my duty.

Q. What were your duties as assistant marine superintendent?

A. To look after the ships and repairs and see that they were facilitated in the operation, and went to sea again.

Q. And to arrange for tugs?

A. To arrange for tugs, yes, sir. Away from the home port.

Q. New York is a port away from home?

A. Yes, sir.

[fol. 32] Q. And your duties include arranging for those things in New York?

A. Yes, sir.

Q. And when something came up and you did not think it right, with reference to the bills of the tugboat companies, your duty was to take up those expenses?

A. Yes, sir.

Q. And you did that?

A. Yes, sir, in this particular case.

Q. And you did it on other occasions?

A. Not that I can remember.

Q. You only remember doing it on one occasion?

A. Yes, sir.

Q. Inasmuch as it was your duty to arrange for tugs away from home, and New York was away from home, and you were to arrange for tugs there, was it not your duty

to see what the arrangements with the tugboat company were?

A. I don't understand your meaning.

Q. Was it not your duty to see and understand and know what the arrangements were with the tugboat companies away from home?

A. Yes, sir.

Q. Then why did you not examine the notices that had the clause on, the pilotage clause on?

A. Because that was not part of my duty.

Q. But you said it was your duty to make arrangements for the tugs?

A. Yes, sir, to make arrangements for the tugs, not to look up pilotage clauses.

Q. When you saw a clause with reference to the arrangements with the tugboat company, why was it not your duty to know what that clause was?

Mr. Bull: I object. A man is not going to look for something he does not know about. It was their place to tell [fol. 33] him if they wanted anything like that.

The Court: That is a matter of argument.

Q. Did you appreciate, Mr. Turnbull, what this maneuver was going to be on the Sabine Sun on this particular day?

A. No, sir.

Q. You did not know where she was going?

A. Yes, sir, I knew where she was going.

Q. Then you knew what the maneuver was going to be?

A. I am not familiar with the general maneuvering in the channel.

Q. You knew where she was going?

A. Yes, sir.

Q. And you knew where she was?

A. Yes, sir.

Q. You had been to New York before and boarded Sun Oil Company steamers and proceeded with the steamers to their destination?

A. Yes, sir.

Q. Then you knew what the maneuver was going to be, did you not?

A. Yes, sir.

Q. And that is what you came to New York for, was it not?

A. Yes, sir.

Q. About how many times before or since have you been on steamers in New York and proceeded with the vessel from anchorage ground or some other place to destination?

A. That is very hard to answer.

Q. Well, about?

A. Probably half a dozen times.

Q. Were they always under their own steam as this vessel was?

A. Yes, sir.

Q. Always under their own steam?

A. Yes, sir.

Q. And did always a tugboat captain act as pilot and take charge?

A. Yes, sir.

Q. Always?

A. Always.

[fol. 34] Q. You knew this was going to occur on this occasion?

A. Yes, sir.

Q. It was not necessary for you to request one of the tugboat captains to act as pilot, was it?

A. No, sir.

Q. You expected that?

A. Yes, sir.

Q. That was your arrangement with Dalzell?

A. I did not make any arrangements.

Q. Those were the arrangements, and the way it had been going on before and since?

A. Previous to my being with the company it was done that way.

Q. A tugboat captain would come on a boat with her own steam and give the orders to the engines and to the helm?

A. Yes, sir.

Q. This particular maneuver was made in the same manner as other maneuvers had been made?

A. Yes, sir.

Q. As far as other tugboat captains coming on board and taking charge was concerned?

A. Yes, sir.

Q. Do you remember who these captains were that came on board?

A. I don't remember the names. I remember one name that I had met before. The first one that came aboard was off one of the Dalzell tugs.

Q. How did you get on board?

A. I went on a launch.

Q. You were on board when the first tug arrived?

A. Yes, sir.

Q. Where were you when the second tugboat captain came on?

A. I was on the bridge.

Q. Who else was on the bridge?

A. The captain of the ship.

Q. Who else?

A. The third mate.

Q. Who else?

A. The quartermaster.

[fol. 35] Q. Do you remember their names?

A. I remember Captain Larson; I don't remember the third mate's name or the quartermaster's.

Q. Had you had any other steamers go to this same place, the Texas Oil Company?

A. Not to my knowledge.

Q. Had you ever met Captain Fort before?

A. Yes, sir.

Q. You knew him?

A. Yes, sir.

Q. And you had been on the bridge on other occasions, or at least one other occasion, when Captain Fort was in charge?

A. Yes, sir.

Q. I believe you testified on direct that when Captain Fort, the second tugboat captain, came on the bridge that Captain Bennett remained on the bridge?

A. Yes, sir.

Q. You remember that?

A. Yes, sir.

Q. When Captain Fort came on the bridge he had a conversation with you?

A. Not to my knowledge.

Q. You do not remember any conversation with Captain Fort?

A. Only just passing the time of day, personal greetings.

Q. No conversation at all?

A. No, sir.

Q. Could you remember what the passing of the time of day was, the exact words?

A. No, sir, I can't remember that; only "How do you do?"

Q. You do not seem to remember very much about what went on when you got on the bridge?

A. No, sir, not at that time.

Q. Captain Fort is here in court, and he is going to testify to a conversation with you. You do not remember anything about it?

A. No, sir.

Q. Do you deny that you had a conversation with him?

[fol. 36] Mr. Bull: I object unless he wants to make him his own witness.

The Court: He may ask him whether he denies having had a conversation about some particular matter.

A. I won't deny any specific conversation. He may have said something to me, but to make any reply I don't remember, being it is since 1925.

Q. Then you will leave it that you do not remember?

The Court: You had better direct his attention to what Captain Fort is going to testify to, because if it was an important conversation it is hardly probable that a person would forget it.

Mr. Bull: When he testifies to it I want to make an objection. And I object to my witness being examined on it first.

Mr. Clark: There is no surprise?

Mr. Bull: No.

The Court: You may ask him.

The Court:

Q. Do you recall any conversation with Captain Fort having to do with the character of the channel and the dangers in an attempt to take this boat up to Newark?

The Witness: No, sir.

The Court: Would you remember a conversation of that kind if it took place?

The Witness: Yes, sir.

The Court: Would you deny that such a conversation or statement upon the part of Captain Fort did take place upon this occasion?

The Witness: Yes, sir.

[fol. 37] Q. Did you have any conversations with Captain Fort at all on this day?

A. Only after the damage, possibly talking about it.

Q. What was the conversation then?

A. I cannot remember.

Q. Don't you remember saying something after the vessel stopped, after she struck something, don't you remember saying something?

A. No, sir.

Q. What was the first thing that you did after she brought up?

A. I went down on the deck to see if I could see what the damage was.

Q. And you ascertained what her condition was, as you testified to on direct?

A. Yes, sir.

Q. What was the next thing?

A. I spoke to our own captain, and told him I had better get some lighters to lighter the ship.

Q. And that was done?

A. And that was done, yes, sir.

Q. Do you yourself know anything about where the boat brought up, I mean, where, with reference to different landmarks in the vicinity?

A. Somewhere around Bergen Point Light.

Q. You are not a navigator?

A. No, sir.

Q. You could not place her yourself?

A. No, sir.

Q. Later, Mr. Turnbull, did someone else come on board?

A. I believe they did, but I did not see anybody.

Q. You did not see anyone else come on board?

A. No, sir.

Q. How long did you remain?

A. I went over to get the barges and I was occupied getting the cargo.

Q. How long did you remain on board?

A. Until she went to the dock.

[fol. 38] Q. That was some time, was it not?
A. Yes, sir.
Q. Several hours?
A. Yes, sir; probably three hours.
Q. And you do not remember anyone else coming on board?
A. There may have been; I can't say, no, sir.

Redirect examination.

By Mr. Bull:

Q. When you called up and asked for these tugs, whoever you talked to of the Dalzell Company—did he tell you anything about the pilotage?
A. No, sir.
Q. Any pilotage clause of theirs?
A. No, sir.
Q. Or anything they would call a contract?
A. No, sir.
Q. You said that in view of the fact that you had engaged tugs to take vessels for the Sun Oil Company, you knew how she was going to maneuver?
A. Yes, sir.
Q. You are not a navigator?
A. No, sir.
Q. What did you mean by that?
A. I knew how she was going to start up the channel.
Q. You did not know just when she should go this way or that way, astern, forward, or so on, did you?
A. No, sir.
Q. All you knew was that she was going down to the Passaic River and turn out into Newark Bay, is that it?
A. That is all.

By Mr. Clark:

Q. You knew that one of the tugboat captains was going on board the vessel to take charge, didn't you?
A. He was there; yes, sir.
Q. And you expected that?
A. Yes, sir.

[fol. 39] By Mr. Bull:

Q. Why did you expect that?
A. Because that had previously been done in other cases.
Q. Without asking for one?
A. Yes, sir.
Q. When you said awhile ago that you were on the ship while she was stranded down there for a number of hours until she went up to the dock, you did not mean that you were on her all that time, do you?
A. I was over getting the barges.
Q. And then you came on?
A. Yes, sir.
Q. And then you were on her until you went to the dock?
A. Yes, sir.

The Court: Just what were you doing on the Sabine Sun this day?

The Witness: To arrange with the captain for her stores and equipment, to see that the captain had his papers, and so forth.

Mr. Bull: I offer in evidence letter of February 4, 1929, of libelant's counsel to claimant-respondent's counsel.

Received and marked Libelant's Exhibit 1.

Mr. Bull: I offer in evidence reply dated May 20, 1929.

Received and marked Libelant's Exhibit 2.

Mr. Bull: I also offer in evidence letter of June 28, 1929, from libelant's counsel to claimant-respondent's counsel.

Received and marked Libelant's Exhibit 3.

Mr. Bull: I offer in evidence reply dated July 3, 1929.

[fol. 40] Received and marked Libelant's Exhibit 4.

Libelant's case closed.

HOWARD P. FORT, a witness called on behalf of the claimant-respondent, being duly sworn, testified as follows:

Direct examination.

By Mr. Clark:

Q. What is your business?
A. Master of steam vessels.
Q. What license do you hold?
A. Unlimited tonnage.
Q. What waters?
A. Harbor of New York and tributaries.
Q. Does your business include going up to the Texas Oil Company plant where the Sabine Sun was bound on the day of this accident?
A. It does.
Q. How long have you been following the water?
A. About twenty years.
Q. How long have you held a master's license?
A. Fifteen years.
Q. Just what is your special work as master? What are you engaged in?
A. Ever since I have held a master's license I have been docking steamers.
Q. Around the harbor?
A. Around the harbor.
Q. The same kind of work you were engaged in on the day of this accident?
A. Yes, sir.
Q. Do you remember this Sabine Sun stranding, captain?
A. I do.
Q. On May 15, 1925?
A. Yes.
Q. Where was she bound from, and where to?
[fol. 41] A. Off Staten Island anchorage to the Texas Oil Company.
Q. And she was loaded, or light?
A. Loaded.
Q. And was she under steam or not?
A. She had her own power.
Q. You were master of what tug at that time?
A. Fred B. Dalzell, Jr.

Q. And you met the Sabine Sun, where?
A. I met the Sabine Sun off Port Richmond.
Q. And did you board her?
A. I did.
Q. Did you go on her bridge?
A. I did.
Q. And you relieved whom?
A. Captain Bennett of the tug W. F. Dalzell.
Q. He had been in charge as pilot up to that point?
A. He had been in charge as pilot up to that point.
Q. And when you went on the steamer's bridge and took charge and acted as pilot, who was on the bridge?
A. Captain Turnbull, the third officer of the tug, the quartermaster, Captain Bennett and myself.
Q. How was the weather?
A. Fair; clear.
Q. Any wind to speak of?
A. I don't think there was.
Q. How was the tide?
A. Flood tide.
Q. Full?
A. No, it was about an hour before high water.
Q. Is that the proper time to go up there?
A. It is.
Q. Is that the best time to go up there?
A. Yes.
Q. How long have you been piloting steamers in and out of this particular place? I now refer to the vicinity of where the Sabine Sun was bound on this day?
A. Eight or nine years.
[fol. 42] Q. You have been piloting steamers in and out of there ever since?
A. Yes, sir.
Q. Have you any idea how many steamers you have piloted around the vicinity of where this boat brought up on an obstruction?
A. I have taken so many up there that it would be hard to name the number.
Q. Could you estimate it by saying how many a year, and then say how many years?
A. I average four or five a month. One a week, anyway.
Q. And that is for how many years?
A. For the last seven or eight years.

Q. What were the conditions around the place where this boat struck, at that particular time? I mean, general conditions. I have reference to operations with reference to the channel.

A. It always has been a very difficult channel to navigate from Port Richmond up to the light, or if you go down the Sound to Shooters Island. It is narrow, rocky on both sides and treacherous tides. They were dredging and mud digging, and there were drills in the way, and tows to meet, and a very narrow space to navigate the vessel.

Q. How about the channel markings, buoys, and so forth?

A. You had very few channel markings there, some of the channels were not marked at all.

Q. And how about charts showing the conditions?

A. There was no reliable chart of that district from Port Richmond up, because the engineers would give us a chart, but they would not vouch for it, they would say that that was the best they could do.

Q. When did you know, or when were you informed, that you were going to have the job of piloting this steamer on [fol. 43] this particular day?

A. The day before, I believe.

Q. And were you told anything about what she had or what she was going to draw?

A. They told me she was drawing twenty-five feet six inches.

Q. Did you do anything about the job ahead of time?

A. Yes, I went up there and took soundings, the best I could do with a lead line; of course, you cannot do the best with lead lines.

Q. She expected she was going to draw twenty-five feet six inches?

A. Yes.

Q. You heard Mr. Turnbull say they loaded her to twenty-four feet?

A. When I took her, she was drawing twenty-five feet six inches aft.

Q. Aft?

A. Aft.

Q. How do you know that?

A. I took that from the officers' book on the bridge. I asked for the draft and they told me twenty-five feet six inches, and that is what my office told me to expect.

Q. What method have you of making the turn in the vicinity,—you turn starboard and go up toward the Texas Oil Company? Are there any ranges at all?

A. That is the only thing we can go by.

Q. What is that?

A. A big gas tank over the street, and as soon as you open that up, you start to turn your ship to go up Newark Bay and keep that in line and head up for the west end of the bay.

Q. As you started on this occasion, from the time you took charge, what tugs were there?

A. The W. F. Dalzell, the Dalzellite and the Fred B. Dalzell, Jr.

[fol. 44] Q. Where were those tugs placed?

A. The W. F. on the port bow, the Jr. on the port stern, and the Dalzellite on the starboard bow.

Q. What did you expect to use that for?

A. To help me break her sheer in case she got a sheer in a bad place.

Q. And you were using her engines?

A. We were using her engines.

Q. And you were giving orders to the third mate at the telegraph?

A. Yes, sir.

Q. And was there a man at the wheel?

A. Yes, sir.

Recess to 2 p. m.

New York, February 10, 1930.

Met pursuant to adjournment at 2 P. M.; present as before.

HOWARD P. FORT resumed the stand.

Direct examination.

By Mr. Clark:

Q. When you got on the bridge did you have any conversation with Mr. Turnbull?

A. As soon as I arrived on the bridge I informed Capt. Turnbull, or Mr. Turnbull, that there was considerable risk in going up to this dock, and asked him if he knew where he was going.

Q. Did you explain to him why you said that?

A. I told him about the channel, how they were blasting and digging, and the channel had changed very much, there were dredges and drills up there, and you didn't know what you might find, and also all the conditions of the tide——

Mr. Bull: I object to that, your Honor, to his trying to [fol. 45] show any contract here, that Mr. Turnbull could make any contract, and that there was any mutuality at all.

The Court: I will allow it.

A. (Continued.) I explained to him the conditions and he said, "I will take the risks". He said, "If we do as good as we did the last time I will be very much pleased."

Q. Did he refer to some other time or some other boat when he was on the bridge with you?

A. I went through the same channel almost with a sailing ship of the same company.

Q. With Mr. Turnbull on the bridge?

A. Yes, sir.

Q. As a matter of fact, Capt. Fort, did you obtain that morning from the engineers a blue print, so you could get the last information about the situation down there?

A. I got a blue print from the engineers, and I also bought the latest chart.

Q. The blue print you turned over to us, did you?

A. Yes, sir.

Q. Do you know whether you can identify it in any other way than by saying you turned it over to us?

A. It is weather-worn on the back there, that is all; it is my chart, I think.

Mr. Clark: In order to make it clear, your Honor, Mr. Shortridge can testify that Capt. Fort handed it to him; that is the only way I can identify it. The blue print is dated May 16, 1925, the day of the accident.

By the Court:

Q. When you had this conversation with Mr. Turnbull, did you have any thought of not wanting to go up with the ship if he didn't assume the risk?

A. What is that, your Honor?

[fol. 46] Q. I say, if you had any thought of not wanting to go ahead with the ship, if Mr. Turnbull had said that he wouldn't have taken the risk?

A. If he hadn't taken the risk, I would have taken the ship back to anchorage.

Q. After you were under way?

A. Yes, sir.

Q. Where were you when the conversation took place?

A. Right off Port Richmond, three-quarters of a mile from the place where the ship touched.

By Mr. Clark:

Q. This ship was drawing more than any other ship you had taken up there before, wasn't she?

A. 1½ feet, 24 was the largest I had taken up there.

Q. Did you pick up the range?

A. No, I hadn't the ranges on, for I proceeded up Newark Bay——

Q. What happened?

A. She struck something.

Q. Were you on the ranges then, or proceeding as you usually did?

A. The same as I had taken up other ships.

Q. The same as you have taken up ships since?

A. Yes.

Q. Was that the only accident you ever had?

A. Yes, sir.

Q. Do you know what she struck?

A. I don't know what she struck to this day, only what I heard.

Q. After she struck—was Mr. Turnbull there at the time she struck?

A. Yes, sir.

Q. Afterwards did he say anything?

A. Yes.

Q. What did he say?

A. There was a lot of conversation, getting barges, and after things quieted down he said, "This is a hell of a place to take a ship, and no more of my ships will come in here, if I can help it."

[fol. 47] Q. You were paid the pilotage for going on the bridge and taking charge?

A. I received $15 for taking charge.

Q. From the Sun Oil Company, owner of the ship?

A. Yes, sir.

Q. While you were there together, you and the ship, did any other steamer pass you?

A. There was a Federal ship went past to the east of me while we were under stop at Bergen Point.

Q. About how long afterwards?

A. A half an hour afterwards.

Cross-examination.

By Mr. Bull:

Q. Captain, you said you have taken a number of ships up there?

A. Yes, sir.

Q. Had you, on May 15, 1925?

A. Had I taken them up previous to that?

Q. Yes.

A. Many ships.

Q. Up around Bergen Point and into Newark Bay?

A. Yes, sir.

Q. How many ships the size of the Sabine Sun had you taken up there?

A. Quite a few.

Q. Were you familiar with the channel?

A. Yes, sir.

Q. You were?

A. Yes, sir.

Q. Do you know whether the Sabine Sun grounded in the channel or out of the channel?

A. Well, from my ranges, where the channel is supposed to be, she was in the channel.

Q. I asked you if you know whether or not she was in or out of the channel when she grounded; do you know?

A. I am not positive.

Q. You don't know anything about it, whether she was in or out of the channel?

A. I know she was on the ranges.

[fol. 48] Q. You mean at the time she grounded?

A. Yes, sir.
Q. On what range?
A. The one I have testified to, the gas tower and an open street.
Q. Where was the gas tower?
A. Under our stern when I turned around.
Q. And how do you know you were on the range?
A. I came up abreast of it and backed the ship——
Q. As you are going down Kill van Kull?
A. Yes.
Q. How do you know when to turn?
A. I get the tank over the street.
Q. From where you were standing at the time?
A. On the bridge, yes, sir.
Q. Then what do you do?
A. I back the ship down.
Q. You back her?
A. She has got headway on and I back and stand still and come hard aport and go up Newark Bay.
Q. Do you just start up a little to get the headway on and make the turn without stopping at all?
A. A 45-degree turn; sometimes we stop and sometimes we don't.
Q. Did you stop this time?
A. We stopped on something.
Q. I mean, did you stop when you were making the turn before you grounded?
A. No, I was drifting ahead slowly.
Q. How was the tide?
A. Flood tide.
Q. Setting towards Shooters Island?
A. Yes, sir.
Q. How far did you come from Shooters Island?
A. I should judge 800 feet.
Q. 800 feet?
A. About that, I should judge.
Q. And that is as near to Shooters Island as you ever got?
A. With this ship, yes.
[fol. 49] Q. Does that mean Shooters Island pier that stands out from there or what?
A. It means from the outside of the Shooters Island long dock; we use that always as a range coming up.

Q. And you were 800 feet off from that?

A. That is as near as I can put it, yes, sir.

Q. Do you have to have the channel marked on there so you will know where to go?

A. Why, no.

Q. You know those waters, do you?

A. Yes, sir.

Q. The fact that you said before that the channel markings were poor didn't mean anything?

A. It did about the dredging and the channel not being officially opened.

Q. You say the channel was closed then?

A. We couldn't get any reliable charts.

Q. Did you have to have channel markings, or get around there without—you said you didn't?

A. Yes.

Q. You know it without any markings?

A. Yes.

Q. Then why don't you know whether you were in or out of the channel when you grounded?

A. I was in the channel, according to the ranges.

Q. Have you seen the pleadings in this case?

A. No, I haven't.

Mr. Clark: He doesn't know what pleadings are.

Q. The answer to the libel—the libel and the answer to it.

A. I have talked with Mr. Clark about it a couple of times.

Q. And you probably talked to him before he drew the answer?

A. I was here last week——

Q. I mean away back, when the case was started.

A. That is so far back I can't remember.

Q. It is so far back. Well, let me see if this is right. It is pleaded here, and I suppose this information was ob-
[fol. 50] tained from you: "Respondent does not know whether the grounding occurred in the channel"; is that right?

A. I didn't make any such statement.

Q. Didn't you know they must have found that out from you?

A. I had her in the channel according to the ranges, I went up there with other ships——

Q. All you know is about the ranges?

A. That is all we have to go by.

Q. Will you agree with me that if your vessel was setting more over to Bergen Point you still might have had that same range, mightn't you?

A. You wouldn't have it on, you would have it off.

Q. Couldn't you get your ship in such a position that you would have it on?

A. No, if you keep the ranges on, your ship would be in the channel.

Q. Although it drifted over toward Bergen Point?

A. As soon as you drift it gets out of place.

Q. No matter whether the vessel keeps its same position or not?

A. If you go ahead you keep the ranges on; if you go sideways they go out of sight.

Q. How far would you have to go sideways to get them out of sight?

A. Very little; they are very big ranges; as soon as you make a turn and go up the Bay, they disappear.

Q. How soon do they disappear?

A. When you get about half way up to the Texas Oil Company they close in.

Q. You grounded long before you got up there?

A. Oh, yes.

[fol. 51] Q. You were just making the turn, weren't you?

A. Just making the turn, yes.

Q. Are there any buoys around there?

A. Two buoys on the middle ground.

Q. And did you use those at all?

A. No, I did not.

Q. You never used those?

A. No, sir.

Q. Now, you say that you were told, I think, that the ship was drawing 25 feet 6 inches aft, or you saw it in some book?

A. I didn't see it; I asked the men on the bridge, I asked the captain direct, if I remember right, as I ordinarily do, what the draft of the ship was, and he referred me to the third officer, and he told me 25 feet 6 inches.

Q. When was that?

A. When I went aboard the steamer.

Q. You never looked yourself, did you?

A. I did not.

Q. So that you knew before you started to go around Bergen Point that you had a draft in excess of 24 feet, didn't you?

A. I did.

Q. This was only aft, and you didn't know what it was up forward?

A. No, I didn't.

Q. You said before something about seeing it in some book on the bridge; what was that?

A. I didn't see it in the book; I said the third officer took it off of his book.

Q. You saw him look in his book and read it out?

A. Yes.

Q. What book was that?

A. A little logbook, I think, that he keeps.

Q. You don't know what book it is?

A. The same book that they put the bells in on the bridge, or a scrap of paper, just to memorize it.

[fol. 52] Q. What ship was it you took up there a month before?

A. I don't know; I had plenty of other ships; I don't remember the name.

Q. But it was a Sun Oil ship?

A. I never took a ship of the Texas Oil Company.

Q. Where did you take the one you mentioned before?

A. From Trinity Point.

Q. Where is that?

A. Further down the Kill van Kull 5 or 6 miles.

Q. You go down to Bergen Point and around and turn up into Newark Bay?

A. Yes.

Q. And the ship you were talking about a moment ago that Mr. Turnbull was on didn't go up into Newark Bay, did it?

A. The one he was on?

Q. Not the Sabine Sun, the one you had a month before.

A. Mr. Turnbull was on.

Q. But it didn't go up into Newark Bay?

A. No, it went up by the same place that we struck with the Sabine Sun.

Q. You didn't have to turn into Newark Bay to go where you went that time?

A. No.

Q. So you didn't go up the same place or over the same ground or water?

A. Outside of the turning point.

Q. But that was going up or down the Kill van Kull only?

A. Yes.

Q. Now, you say you told Mr. Turnbull when you went on board that this was a dangerous place, did you?

A. Yes, sir.

Q. How did you know it was?

A. Because so many vessels ground there.

Q. Did you ever ground a vessel there?

A. Not previous to this.

Q. I meant previous to this.

A. No.

Q. But you knew it was a dangerous place, did you?

A. Yes.

[fol. 53] Q. How many vessels of that size had you ever taken around there, I mean around Bergen Point, not down Kill van Kull?

A. Quite a few.

Q. As large as the Sabine Sun?

A. Yes, the Texas Oil ships.

Q. You didn't join the Sabine Sun until it got to Port Richmond, did you?

A. No.

Q. Where did you come from there?

A. Out of Port Richmond.

Q. You hadn't been down Kill van Kull?

A. Not that day.

Q. When was it you went down the Kill van Kull and took soundings?

A. 3 or 4 days previous; I can't recollect the date, but previous to the time I took charge of the ship.

Q. Weren't you down there the same day that you joined the Sabine Sun?

A. I can't remember that.

Q. When you took the soundings did you take soundings at this place where you grounded?

A. No, I don't think I did.

Q. What was the purpose of taking soundings?

A. They said there was 30 feet of water there, and I went up to find out if there was that much water.

Q. You mean the whole channel?

A. Yes, sir, the whole channel.

Q. And you went down there and satisfied yourself that there was 30 feet of water in the channel?

A. I satisfied myself the best I could with a lead line.

Q. And the soundings you took showed 30 feet?

A. Not always.

Q. What was the lowest?

A. 24, 23, outside the channel.

[fol. 54] Q. What was the lowest you got in the channel?

A. 26.

Q. When you came on board at Port Richmond why did you take the place of Captain Bennett?

A. Because I was licensed up there, and I was more familiar with the place.

Q. Did he know you were coming to relieve him?

A. I think he did.

Q. Who told him that?

A. My office.

Q. Dalzell Towing Company?

A. Yes, sir.

Q. Somebody there told him that day or the day before?

A. They told me at Port Richmond that the ship was bound in, and for me to take charge of it.

Q. Did they tell you that somebody else would be on until you got there?

A. Yes, sir.

Q. And you relieved him?

A. Yes.

Q. Why didn't he go back on his tug?

A. He wanted to stay on and learn the way into Bergen Point.

Q. Now, you say when you told Mr. Turnbull that this was a dangerous place, he said that he understood, he had been there with you before, and that you did well then, didn't he?

A. He said he would depend on my judgment and if I did as good a job then as I did before, he would be satisfied.

Q. The time before you didn't have any stranding, did you?

A. No.

Q. Do you know whether or not Mr. Turnbull was authorized to agree to assume responsibility?

Mr. Clark: Objected to.

Mr. Bull: He has testified on direct that Mr. Turnbull did say that.

Mr. Clark: I don't think what he knew or thought about this man having authority——

[fol. 55] The Court: If he knows anything about it he can tell.

Q. Do you know?

A. I knew Mr. Turnbull had charge of those ships; in fact, I did all my talking to Mr. Turnbull, not to the captain of the ship.

Q. And that is all you know about it?

A. That is all I know about it.

Q. Did you have authority from the Dalzell Towing Company to make any arrangement like that?

A. We always have that authority; first talk to the captains; if they don't want to go——

Q. Do you always take a ship halfway or part of the way and then if they won't agree to assume all responsibility, you drop the job and go back, is that customary?

A. Yes, sir.

Q. That is customary?

A. Yes, sir. If we advise the captain a job isn't safe, we don't assume responsibility.

Q. Do you think you should wait until you get part ways through with him, and then tell him you won't assume responsibility?

A. These are my orders, that is all I know; I got orders to go aboard the ship at Port Richmond, and I told him as soon as I got aboard.

Q. And what did you agree to do if he assumed the responsibility?

A. I would do my best to take the ship in.

Q. Don't you know that when you are piloting a ship you should do your best anyway?

A. We do our best all the time.

Q. What was your purpose in going down there three or four days before there and sounding?

A. Well, on account of the new dredging and drilling, the channel was only good for 24 feet before that, and the engineers claimed there was 30 feet, and I couldn't get [fol. 56] a reliable chart, and I went down to satisfy myself.

Q. What were you intending to take up there?

A. The Sabine Sun.

Q. How did you know that?

A. I believe the Dalzell had been notified——

Q. Dalzell had told you that that was going to be done?

A. He said the ship is arriving and expected to go to the Texas Oil Company.

Q. And did they tell you to go down, or did you go down on your own account?

A. I went down myself the first chance I got, I dropped the lead line myself.

By the Court:

Q. You say it was only 24 feet in some places in the channel?

A. Yes, sir.

Q. How did you expect to get through?

A. Sometimes you go down there and you don't know what you hit. They are blasting rocks all the time and there is mud.

Q. You said there was 24 feet?

A. 26 feet in and 24 feet.

Q. How did you get 27 feet 6 inches?

A. 25 feet 6 inches it was at high water.

By Mr. Bull:

Q. It was low water when you took the soundings?

A. Yes.

Q. What time of day?

A. I can't recall; it was low water when I took the soundings.

Q. As you make the turn to go into Newark Bay, the tide would fetch you over to Shooters Island?

A. There is a tide we meet when we turn the ship; it is a very dangerous place to turn.

Q. Won't it set you over?

A. Until you meet the tide coming from the other direction.

[fol. 57] Q. And you are close up to Shooters Island?

A. Oh, yes, when you pass that way.

Q. In making that turn is it your purpose to keep close to Shooters or over to Bergen Point?

A. Not necessarily; you try to keep in the middle of the channel.

Q. I am trying to find out where that is.

A. I go by ranges.

Q. How far is the middle of the channel from where you grounded?

A. It was only 300 feet.

Q. How far is it from where you grounded?

A. I don't know.

Q. How far is it from Shooters Island?

A. I figured 800 or 900 feet.

Q. The middle of the channel is?

A. That is only an assumption.

Q. So if you turn in the middle of the channel 800 feet off Shooters Island pier, the tide would be apt to keep you over?

A. The tide would take my stern and the tide coming from the other direction would take her bow and turn her on a pivot.

Q. That is, after you have gone by where you stranded?

A. Three tides are met there.

Q. Did you meet the other one when you got up above where you stranded?

A. You meet them all there.

Q. All in one spot?

A. Yes, sir.

Q. Where you started to turn?

A. Yes, sir.

Redirect examination.

By Mr. Clark:

Q. Did the three tugs obey all the orders that were given them?

A. Yes, sir.

Q. They did everything that was required of them, did they?

A. Yes, sir.

[fol. 58] ALBERT F. BENNETT, being duly sworn and examined as a witness for the respondent, testifies:

Direct examination.

By Mr. Clark:

Q. What is your business, Capt. Bennett?

A. Tugboat captain.

Q. What licenses do you hold?

A. Inland water, New York Bay and Harbor.

Q. How long have you held it?

A. 24 years.

Q. How long have you been following the water?

A. 29.

Q. And your specialty is piloting steamers around New York Harbor, docking and undocking, and so forth?

A. Yes, sir.

Q. You went to the steamer Sabine Sun on the morning of May 15, 1925?

A. Yes, sir.

Q. You boarded her where?

A. Staten Island, Port Richmond.

Q. You went on her bridge?

A. Yes, sir.

Q. And you were the tugboat captain in charge of the maneuver up to a certain point?

A. Yes, sir.

Q. How far did you take her?

A. To Port Richmond.

Q. And who came on board there?

A. Captain Fort.

Q. You understood that he was coming on board, did you?

A. Yes, sir.

Q. Your license carried you how far?

A. Well, we thought at that time it did cover those waters, but when I got my examination there was no ex-

amination for those waters up there, and they have got an examination for them, and it turned us fellows out.

Q. The reason you turned over the pilotage of the boat from Port Richmond on was because your license didn't [fol. 59] cover it, or you didn't think it did, and Capt. Fort's did?

A. Yes, sir.

Q. Does your license now cover them?

A. Yes, sir.

Q. Were you on the bridge when Capt. Fort came on the bridge?

A. Yes, sir.

Q. Who else was there?

A. Capt. Turnbull, the captain of the ship, one of the officers, and a quartermaster.

Q. Who was at the telegraph?

A. One of the officers.

Q. The quartermaster at the wheel?

A. And the captain of the ship and Mr. Turnbull were at different parts of the bridge.

Q. Did you hear any conversation between Capt. Fort and Capt. Turnbull?

A. Yes. He told Capt. Turnbull that it was no safe place to take a ship with that draft, and Capt. Turnbull said something about responsibility, if he did as good a job as he did before—which job he meant, I didn't know.

Q. But you heard Capt. Fort talking to Mr. Turnbull about the dangerous job it was, didn't you?

A. Yes, sir.

Q. There is no question in your mind about that?

A. No, sir.

Q. Can you remember any of the exact words you heard?

A. Only I heard Capt. Turnbull say that he would be responsible, and something about if he done the job as good as he done before—I couldn't get exactly, for I was standing too for away to get it all.

Q. But you did hear the conversation?

A. Yes, sir.

Q. You remained on the bridge, did you?

A. Yes, sir.

[fol. 60] Q. And you were on the bridge at the time she brought up?

A. Yes, sir.

Q. And at that time—try not to testify what you know now—but at that time did you know what the ranges were there and what the course up there was?

A. Not exactly; not for deep water.

Q. Not for a vessel of this draft?

A. No.

Q. So you can't say whether she was in the channel or not, can you?

A. No, sir.

No cross examination.

GEORGE DALZELL, being duly sworn and examined as a witness for the respondent, testifies:

Direct examination.

By Mr. Clark:

Q. You are an officer of the Dalzell Company?

A. Yes, sir.

Q. Did you ever receive any notice of survey on the Sabine Sun?

A. No.

Q. Never?

A. Never.

Q. What was the first you ever knew that any claim was to be made against your company or the tugs that you are interested in?

A. In March, 1926, we got a letter from Messrs. Duncan & Mount, saying that we had—

Q. That was the first you had heard of it?

A. Yes.

Q. The first claim that was made?

A. Yes, sir.

Q. About ten months afterwards?

A. Yes, sir.

Q. Do you still do business for the Sun Oil Company?
A. Yes, sir.
Q. You still do business with Mr. Turnbull?
A. Yes, sir.
[fol. 61] Q. Have you ever heard any question ever raised about the pilotage clause?
A. No, we always went on the same as we always done.
Q. And you are still doing business?
A. Yes.
Q. You are still doing it the same as you always did?

Objected to.

The Court: Objection sustained.

Q. Have you piloted any steamers recently for the Sun Oil Company?
A. Yes. We are waiting orders for one to take her out now.

Mr. Clark: We offer in evidence a stipulation giving the bearings and position of the steamer as taken by A. J. Fulton.

(Received and marked Respondent's Exhibit J in evidence.)

Mr. Clark: Those bearings, your Honor, are the ones I referred to in the opening as the bearings which Mr. Shortridge used in placing the steamer. Now I have here a blue print which Mr. Fort handed to Mr. Shortridge, and if Mr. Bull wants it I will have Mr. Shortridge take the stand and say it is the one.

Mr. Bull: I will agree to that.

Mr. Clark: The blue print is offered in evidence.

Mr. Bull: This is an old one, 1923, two years before that; I think we ought to have one a little more up-to-date.

Mr. Clark: This is the one we got from the Army Engineers that morning.

Mr. Bull: Well, I will agree that it is the one they got, without the marks that are on it.

[fol. 62] Mr. Clark: We can't claim that the plotting is part of the exhibit.

(Received and marked Respondent's Exhibit K in evidence.)

Respondent rests.

REBUTTAL

A. J. FULTON, being duly sworn and examined as a witness for the libelant, testifies:

Direct examination.

By Mr. Bull:

Mr. Clark: What is the purpose of calling Mr. Fulton? I thought we stipulated——

Mr. Bull: But you say that the draft is more than it was, that is all I want to ask him, if that is satisfactory?

Mr. Clark: It is stipulated.

(Witness withdrawn.)

MORTIMER R. FOUNTAIN, being duly sworn and examined as a witness for the libelant, testifies:

Direct examination.

By Mr. Bull:

Q. Captain Fountain, what is your occupation?

A. Master and pilot of steam vessels?

Q. How long have you held a license?

A. 34 years.

Q. Did you hold a license for the waters around the Kill van Kull and Newark Bay in May, 1925?

A. Yes, sir.

[fol. 63] Q. And for how long before that?

A. Well, about 23 years previous.

Q. Are you familiar with the channel both through the Kill van Kull and around the Point and up into Newark Bay?

A. Yes, sir.

Q. Have you taken many ships up through there?

A. Quite a few.

Q. How large?

A. Oh, ships—well—I had some as high as 140,000 barrels.

Q. What draft?

A. I have taken, since then I have taken as high as 30½.

Q. How high had you taken before that?

A. 27—28—about 27½.

Q. And how large a vessel have you taken from the standard of dimensions, have you any idea?

A. About a 6,000 ton vessel.

Q. Do you know the Sabine Sun?

A. Yes, sir.

Q. Have you taken, or had you taken before May 15, 1925, many vessels as large as that up there?

A. They were all as large as her.

Q. Can you give us any idea of how many you have taken up there per month or year, or something like that, just a rough average?

A. About 75 a year.

Q. Have you taken up all the Texas Company tankers?

A. Yes, sir.

Q. And those are as large as the Sabine Sun and larger?

A. About the same size; some a little bit larger.

Q. Now, this answer of yours doesn't just apply down Kill van Kull, around Bergen Point, and up into Newark Bay, does it?

A. Yes, sir.

Q. Have you ever stranded a vessel going around Bergen Point?

A. No, sir.

Q. Did you see the Sabine Sun on May 15, 1925?

A. Yes, sir.

[fol. 64] Q. Where was she at the time you saw her?

A. Well, she was aground at the Point between Shooters Island and Bergen Point Lighthouse.

Q. Do you know which side of the channel?

A. On the starboard side of the channel—that is on the east side.

Q. On the east side. Was she in the channel or out of the channel?

Mr. Clark: If your Honor please, I don't think the witness can testify as to that.

The Court: He said he knew where the channel was.

Mr. Clark: We have got the bearings right here.

The Court: I will allow him to answer.

Q. Was she inside of the channel or out of the channel?

A. She was outside the channel when I got to her.

Q. Did you notice what part of her was on the ground?
A. The bow, forward of the bridge.
Q. Did you know what her draft was then?
A. Well, I understood somebody to say that she was——

Mr. Clark: Objected to.

Mr. Bull: That is Captain Fort's testimony.

Mr. Clark: Captain Fort was on the vessel in the capacity of the man who was to take charge and inquired as usual and received the answer as usual—that is an entirely different matter.

Mr. Bull: When he could very well have looked to see.

[fol. 65] The Court: You can ask him what he knew.

Q. Had you ever taken a vessel where this one was grounded?

A. No, not where she was when I got to her, not of that draft.

Q. After you got there what was done?

A. Well, I asked Captain Fort if I could be of any assistance to him, and he asked me if I would come up on the bridge, and I went up on the bridge and we talked matters over, and I was going to help him out all I could, and in the meantime a gentleman from the Texas Oil Company came down on one of the Texas tugs, and asked what was the matter, and we acquainted him that the vessel was ashore, and I got busy with him and asked him if he couldn't give us a couple of lighters and get some of the cargo off and see if we couldn't get her off before any more damage was done; and they done that, and that evening, between half past six and seven o'clock, we got her so we could move her, and after got up to the Texas Dock.

Q. Did you learn what her draft was when you got her off?

Mr. Clark: What do you mean by "learn"?

Q. Well, do you know what it was?
A. I was informed that it was——

Mr. Clark: I object.

The Court: He was there when they were getting her off; I will allow it.

A. (Continued.) I asked for her draft, what she was drawing aft, and they told me she was drawing close to [fol. 66] 26½ aft. Her bow had been lightened up.

Q. How was she forward?

A. We backed her up and backed her into the channel parallel to the Staten Island shore, and maneuvered her in such a position to get her up and make the turn between Shooters Island and Bergen Point light, and then brought her up to the dock.

Q. When she was pulled back off the rock or ground, or whatever it was, she was pulled back into Kill van Kull?

A. Yes.

Q. So in order to get her up to the Texas Dock you had to make the same turn that had to be made before, is that it?

A. Yes.

Q. Who directed the navigation then?

A. She was turned over to me then and of course I done all I could to get the ship right.

Q. Did you take her where she was when you first saw her aground?

A. I took her off there and straightened her up and brought her up to the Texas Oil pier.

Q. I mean after you had taken her off the ground and taken the turn—did you take her in the same place where she had been aground before?

A. Oh, no.

Q. When you take vessels of that size up there how do you make the maneuver around the bend there?

A. Well, I generally go up—easy by Bergen Point Light until my bows is I judge about half way between Bergen Point Light and Shooters Island, and then I start to make the turn, allowing for a certain amount of sweep which will bring you nearer when I am straightened up to Shooters Island.

[fol. 67] Q. How near will that bring you to Shooters Island?

A. About one-third of the distance away from Shooters Island, that is, between Shooters Island and Bergen Point Lighthouse.

Q. Have you any idea what it would be in feet?

A. No, I never measured it.

Q. And having done that, what would you next do?

A. Straighten her up, get her on ranges; I use a church steeple on Staten Island, and the middle tower of the rail-

road bridge across Newark Bay, and head her between those two marks and go up.

Q. You get her turned around and lined up and turn around and take her straight up, is that it?

A. Yes.

Q. How far do you keep off from this point where you found her stranded?

A. Generally with a draft I have been taking up there, I keep her half way between where she was and Shooters Island, but I don't know how much further off you can go that way; that is the way I generally do.

Q. How wide is the channel there?

A. I judge it to be 500 feet, safely 500 feet.

Q. Did you have any trouble getting the Sabine Sun up there this time after she was backed off?

A. No; after we backed off and made the turn we went up to the dock and I turned her over to Captain Fort.

Q. And you left?

A. He took charge of the docking then.

Q. How was the tide when you got there, do you know?

A. Well, the tide was about done when I got there.

Q. And how long after that was it when you got her off?

A. Pretty close to three hours.

[fol. 68] Q. Close to three hours. So was the tide much lower at that time?

A. Well, the tide had fallen some.

Q. She couldn't stand as great a draft then as she could when she stranded?

A. Hardly, with a falling tide.

Q. The tide sets down from Shooters Island, does it?

A. There is a channel back of Shooters Island, sort of a sluice, and the last of the tide from Elizabethport strikes the dock there and tends to set from the north side of Shooters Island over toward Bergen Point Light.

Q. And when would that affect a ship?

A. That generally comes along towards high water, at Governor's Island high water.

Q. Would that affect your ship as soon as you attempted to make the turn or after?

A. No, you have got to turn.

Q. And you are headed straight up into Newark Bay at the time it hits?

A. Yes.

Q. How do you work your engines and tugs then?

A. After we get the turn made and the ship in the proper position to head up Newark Bay we generally give them full speed ahead to get steerageway on.

Q. How were the conditions on this day for this maneuver?

A. Well, of course, the weather was calm, but as far as the grounding of the vessel is concerned, I was not there when that happened, and of course I can't tell what conditions were at that time.

Q. But the tide was the last of the flood when you got there?

A. Yes.

Q. So it must have been flood tide?

A. It must have been flood tide when she came up there.

[fol. 69] Q. Is that what you want to make the maneuver?

A. Well, as a general rule, when I am going up I figure to have it about slack water there.

Q. That would be the last of the flood?

A. Yes.

Q. What time was it when you got there?

A. I should judge it was about 4 o'clock, or perhaps a couple of minutes before, maybe 5 or 10 minutes before, as near as I can recollect.

Cross-examination.

By Mr. Clark:

Q. How did you happen to be there?

A. I had been down on a job at the Mexican Petroleum Dock at Carteret, and as soon as I finished I started on my way back for New York.

Q. How can you tell the time you got there?

A. I docked the ship at Carteret, but as near as I can recollect that date it was around maybe five or ten minutes before; I know it was just shortly before 4 o'clock.

Q. Have you some way of finding out just when it was?

A. No, I didn't get a report of it.

Q. You gave a statement to somebody?

A. No, I never gave a statement to anybody.

Q. You never gave a statement about it?

A. No, sir.

Q. So you are now testifying about events nearly five years ago, and have never spoken of them since?

A. I kept it in mind pretty well, thinking about the thing, thinking the same thing might happen to me.

Q. What makes you think that?

A. Well, it may happen to anybody.

Q. It was a very difficult and dangerous place?

A. Well, it was not a difficult place; it was not an unsafe place, but you have to be very careful.

[fol. 70] Q. Several other ships struck on something down there?

A. Yes, they have.

Q. They don't generally know what they do strike on?

A. Well, I don't know—maybe I have been lucky.

Q. You know about the Franklin K. Lane?

A. Yes.

Q. You know about the Cerro Azul, and some others have struck on the bottom around where the dredging was being done?

A. Yes.

Q. And both before and since this accident?

A. Yes.

Q. And it was all around where that drilling and blasting is?

A. Well, around in that vicinity.

Q. And you may be the lucky one of all?

A. That is so.

Q. You know Captain Reynolds?

A. Yes.

Q. He has been piloting down there a long time?

A. Yes.

Q. As long as you have?

A. No.

Q. You are there the longest?

A. Yes, somewhat of a pioneer.

Q. Captain Reynolds struck something down there?

A. He struck something two or three times.

Q. Do you know Captain Slauer?

A. Yes, sir.

Q. He struck down there, didn't he?

A. Yes. Maybe they haven't picked my place out yet.

Q. With all these boats striking down there it must be a dangerous place?

A. Yes, it is. Anything is dangerous nowadays with the vessels we get to handle.

Q. What is the matter with them?

A. I don't know; things go wrong, you can't be bothered.

Q. Well, as near as you can say about when you got there was a little before 4 o'clock?

A. Just about that.

[fol. 71] Q. Now, did I understand you to say that you went on board of the vessel and she was turned over to you?

A. Not exactly turned over to me; Captain Fort called me in and we talked things over, and we made up our mind to get busy then, and do what we could to get the ship off. It was a sort of a worry about what would happen when the next flood tide made. So the folks at the Texas Oil Docks were good enough to let us have a couple of lighters and I thought if we pumped all the tanks would hold we might get enough forward before anything worse happened.

Q. You went on board and were assisting and giving your advice as to getting her afloat?

A. Yes, sir.

Q. You don't want the Court to understand that Captain Fort turned the steamer over to you?

A. Not exactly, but we talked it over.

By the Court:

Q. Did you give instructions after you got on board?

A. After we got the vessel light enough to float, I gave the orders to those in charge.

By Mr. Clark:

Q. You took full charge?

A. You can't take full charge, you are only there to assist, not as long as there is a master on the ship.

Q. I want to know whether you want the Court to understand that you took charge of the ship.

By the Court:

Q. Did you give them orders about bells and how to place the engines?

A. He sort of acted on my advice and between the two of us we maneuvered her back.

[fol. 72] By Mr. Clark:

Q. Who? Captain Fort remained in charge?
A. He stayed on the ship.
Q. Did he remain in charge?
A. Yes, I guess so.
Q. Do you know Captain Rex?
A. Yes.
Q. You know he had one of the Pan-American ships strike there, don't you?
A. Yes.
Q. Do you know Captain ——?
A. Yes.
Q. He had one too?
A. Yes.
Q. That was right near the dredge?
A. Well, that was quite a ways off.

By the Court:

Q. Do you know anything about the ranges there, at the end of the street and the gas tank?
A. Well, I have ranges that I use myself; there is a gas tank as you go up and as that gas tank begins to show over the street you begin to turn, and when you have made the turn there is a house on the west side of the street, that when you have made the turn safely, this gas tank shows over this house, backward; after that shows you know you are clear of those spots that are on the Point.

By Mr. Clark:

Q. You mean the 18-foot spot?
A. Yes.
Q. And those are the same ranges that Capt. Fort was talking about?
A. It may be the same ones.
Q. You use the same ones?
A. I never had anyone tell me what ranges they used. I used my own.
Q. You didn't do your navigation by any aids established by the Government?
A. Well, no.
Q. There weren't any?
A. No.
[fol. 73] Q. You had to use your own?
A. Yes.

Q. And that was the gas tank and opening up the street?

A. You get the gas tanks opening up by the street, and the proper way is to have the gas tank over the house that is on the west side of the street, and then you begin to turn.

(Witness excused.)

LEOPOLD A. TURNBULL, recalled, testified as follows:

By Mr. Bull:

Q. Did you hear Captain Fort's statement that he told you that this was a dangerous place and you told him that was all right, that you would assume the responsibility; did you hear him testify that?

A. Yes, sir.

Q. Did you make any statement of that kind to him?

A. No, sir.

Q. Did you tell him anything about your assuming responsibility, or what you would do about the way he took her around the Point?

A. No, sir, I had no authority to do it.

Q. You had no authority to do it?

A. No, sir.

By Mr. Clark:

Q. Did you hear what Captain Fort said about the remark you made after she brought up?

A. Yes, sir.

Q. You heard what he testified that you said?

A. Yes, sir.

Q. Do you remember saying that now?

A. No.

Q. Do you deny saying that?

A. I don't deny it, but I don't remember it.

[fol. 74] Q. Are you still doing business with the Dalzell Company?

A. Yes, sir.

Q. And as far as you know, there has never been any question taken up with them since this accident about this pilotage clause?

A. Not as far as I know.

Q. You have known about the pilotage clause, haven't you?

A. Since there was some talk about it.

Q. But you have never done anything about it?

A. No, sir.

Q. You have been going around in the same old way, haven't you?

A. Yes, sir.

(Witness excused.)

Both sides rest.

[fol. 75] LIBELANT'S EXHIBIT 1

February 4, 1929.

Messrs. Burlingham, Veeder, Fearey, Clark & Hupper, 27 William Street, New York, N. Y.

(Attention—Mr. Clark.) SS. Sabine Sun—Dalzell Tugs.
Our No. 9946

DEAR SIRS: We understand as a result of a conference between our Mr. Duncan and your Mr. Clark that you will now agree, for the purpose of this trial, to admit operation by the Dalzell Towing Company of the tugs Dalzellite, W. F. Dalzell and Fred B. Dalzell, Jr. If our understanding is correct, kindly confirm same and oblige,

Yours very truly, —— ——.

HWD. H.

[fol. 76] LIBELANT'S EXHIBIT 2

[Letterhead of Burlingham, Veeder, Fearey, Clark & Hupper]

27 William Street,
New York, May 20, 1929.

Sabine Sun—Dalzell Tugs

Messrs. Duncan & Mount, 27 William Street, New York City.

DEAR SIRS: We acknowledge receipt of your letter of May 14, 1929, and confirm your understanding as expressed in your letter of February 4, 1929.

Very truly yours, Burlingham, Veeder, Fearey, Clark & Hupper, Chauncey I. Clark.

CIC:H.

[fol. 77] LIBELANT'S EXHIBIT 3

June 28, 1929.

Messrs. Burlingham, Veeder, Fearey, Clark & Hupper, 27 William Street, New York City.

(Att. Mr. Clark.) S. S. Sabine Sun—Our 9946

DEAR SIRS: From your letter of June 19 and our telephone conversation of today, we understand that you are not authorized to agree to the last clause in paragraph number two of our letter of June 15, but that you will agree not to offer any evidence that the master of the Sabine Sun knew of or overheard any agreement between the tug captain and Mr. Turnbull such as is alleged in the answers to the libel. In this situation we understand that our stipulation in this case is as follows:

1. That the master was not guilty of any negligence contributing to the grounding of the Sabine Sun.

2. That the master of the Sabine Sun was not a party to the alleged agreement between the tug captain and Mr. Turnbull, and that no evidence will be offered tending to prove that the master did know of or hear such an agreement.

Will you kindly confirm that our agreement is as set out in the two paragraphs above.

Very truly yours, ——— ———.

FAB:T.

[fol. 78] LIBELANT'S EXHIBIT 4

[Letterhead of Burlingham, Veeder, Fearey, Clark & Hupper]

27 William Street,
New York, July 3, 1929.

Sabine Sun. Attention of Mr. Bull.

Messrs. Duncan & Mount, 27 William Street, New York City.

DEAR SIRS: We acknowledge receipt of your letter of June 28, and confirm your understanding.

Very truly yours, Burlingham, Veeder, Fearey, Clark & Hupper, Chauncey I. Clark.

CIC:A.

[fol. 79] RESPONDENT'S EXHIBIT A

Sun Oil Company

Philadelphia, November 14, 1923.

Dalzell Towing Company, Inc., 21-24 State Street, New York, N. Y.

GENTLEMEN: Your invoice of October 16 against the SS. "Sabine Sun", charge No. 7729, amounting to $366.25, has not been returned to this office for payment. We learn that the invoice has not been approved by our Mr. Turnbull for the reason that although the tugs did arrive alongside the ship and the vessel was not ready, your tugs left the vessel and worked on another.

Mr. Turnbull has been away much of his time and explains why he has not written to your Company about this charge of $56.25, which has been questioned by him and up to the present time has not had his approval.

We will, therefore, appreciate a report from you so it can be sent to Mr. Turnbull and hasten settlement of your invoice.

Yours very truly, Sun Oil Company. Chas. R. Innis, Marine Department.

CRI:NF.

[fol. 80] RESPONDENT'S EXHIBIT B

November 15th, 1923.

Sun Oil Company, Philadelphia, Pa.

Att. Mr. Chas. R. Innis

GENTLEMEN: We thank you for your favor of the 14th inst. with reference to our charge #7729 in the amount of $366.25 for towage services rendered the SS. "Sabine Sun" and in accordance with your request are very pleased indeed to give you a report concerning the item of $56.25 for services to the ship.

On the afternoon of October 10th, we received orders from your Mr. Ray to dispatch tugs to Pier 5, Bayonne for the purpose of assisting the above mentioned vessel to the west side of Pier 2, Tidewater and to have the boats alongside of the ship at 8 A. M. sharp. In order for our tugs to be there at the appointed time, it was necessary for us to

dispatch them from their place of lay up at 7:15 A. M. The tugs arrived alongside of your ship promptly at 8 and upon discovering that the ship was not ready and would not be so for some time to come, they 'phoned our office and informed our dispatcher of this. Several minutes after we had heard from our tugs, your Mr. Turnbull 'phoned our dispatcher saying that the ship was not ready to shift and [fol. 81] that he would let us know later as to the correct time. We again communicated with our tugs and sent them on other work.

While we appreciate the fact that no services were actually rendered your ship, we have found it necessary within the last four or five years, to make running time charges for our tugs and it has, therefore, become a custom of the Port, all companies paying such charges. We are attaching herewith a towage schedule and would like to call your attention to the last paragraph marked with an "X".

We feel quite sure that when you take this matter up with Mr. Turnbull that you will find our contentions to be correct.

Trusting the above explanation is quite satisfactory to you, we are

Yours very truly, Dalzell Towing Company, Inc.
—— ——, Treasurer.

LHD—G.
Encl.

[fol. 82] RESPONDENT'S EXHIBIT C

Telephone Connections. Cable Address: Dalzelline

Dalzell Towing Company, Inc., Agents for Sea, Harbor & Coast Towing, 21-24 State Street, New York

Pro Forma Towage Rates and Contract with Dalzell Towing Company, Inc.

Docking and/or Undocking Vessels

East River

Brooklyn Shore from Bay Ridge Avenue to Navy Yard and points opposite	$25.00 per tug
Brooklyn Navy Yard to Eastern District Terminal, L. I. C. and points opposite	30.00 " "
Port Morris	80.00 " "
Steinway	90.00 " "

North River

From Battery to 17th Street, Hoboken and points opposite	$25.00 per tug
From 17th Street, Hoboken to Weehawken and points opposite	30.00 " "
From Weehawken to Guttenberg Coal Dock and points opposite	40.00 " "
From Guttenberg Coal Deck to Edgewater and points opposite	50.00 " "
Yonkers	75.00 " "

[fol. 83] Lower Bay, Kill Von Kull, Newark Bay

Staten Island Piers	$35.00 per tug
Constable Hook Piers	35.00 " "
Bayonne Piers	35.00 " "
Black Tom	40.00 " "
Claremont	40.00 " "
Greenville	40.00 " "
Port Johnson	45.00 " "
Mariner's Harbor	45.00 " "
Bergen Point	60.00 " "
Port Newark	80.00 " "
Kearny	90.00 " "
Bayway	75.00 " "
Carteret	85.00 " "

Other Points Than Above Described

The docking or undocking of vessels at other points than designated above to be charged for at the rate of $15.00 per hour from the time of the departure of the tug until her return, but in no case shall the charge be less than the minimum charge for the nearest point thereto in the above schedule.

Transporting Vessels

From Dock to Dock, Anchor to Dock or vice versa, the charge will be at the rate of $15.00 per hour per tug with a minimum charge of $30.00 per tug, but in no case shall a

vessel be transported for less than the docking or undocking charge given in schedule.

The running time to and from vessels to be added and is chargeable.

[fol. 84]

Shifting

The shifting of barges and lighters in and about the slips to be charged for at the rate of $12.50 per hour with a minimum charge of $12.50 or one hour between the hours of 7 A. M. and 5 P. M. Before 7 A. M. and after 5 P. M. the charge is $17.50 per hour with a minimum charge of $17.50 or one hour.

When ice interferes with navigation then the rate will be $20.00 per hour with a minimum charge of $20.00 or one hour. Before 7 A. M. and after 5 P. M. the charge will be $25.00 per hour with a minimum charge of $25.00 or one hour.

The running time to and from piers is to be charged for as per schedule.

Services

All services in Bay, attendance with surveyors, clerks, etc. to and from steamers in Bay at the rate of $15.00 per hour per tug. Minimum charge, one hour.

Detention

Detention of tugs caused by vessels not being ready and other conditions beyond our control at the rate of $15.00 per hour per tug.

When tugs are ordered to a certain point to perform services and the orders are cancelled the running charges shall prevail plus waiting time with a minimum charge of one hour or $15.00 per tug.

Supplying Steam

Services of tugs supplying steam are to be charged for at the rate of $15.00 per hour. Running time chargeable.

[fol. 85]

Overtime

$7.50 per hour, per tug additional before 7 A. M. and after 5 P. M. when tug is engaged in rendering a service. Minimum charge one (1) hour.

$7.50 per hour, per tug before 7 A. M. and after 5 P. M. when tug is obliged to wait out in order to render a service with a minimum waiting charge of one hour plus regular towage charges.

Sundays and Holidays

All services performed on Sundays and Holidays are to be charged for at one and one-half times the above rates.

Ice Conditions

The above prices are subject to navigation not being impeded by ice conditions, in which case the charge will be $25.00 per hour per tug, except for shifting barges as specified above. Running time chargeable.

Schedule of Running Time

Battery to Navy Yard	15 minutes each way
Battery to Williamsburg	30 " " "
Battery to Long Island City	45 " " "
Battery to Erie Basin, Brooklyn	15 " " "
Battery to Bay Ridge Avenue, Brooklyn	30 " " "
Battery to Staten Island, Constable Hook and Bayonne	45 " " "
Battery to 10th Street, Hoboken	15 " " "
Battery to Weehawken	30 " " "
Battery to Guttenberg	45 " " "
[fol. 86] Battery to Edgewater, N. J.	1 hour each way
Battery to Port Johnson and Mariners Harbor	1 " " "
Battery to Bergen Point	1 " " "
Battery to Bayway	1½ hours each way
Battery to Carteret	1¾ " " "
Battery to Amboy	2 " " "
Battery to Kearny	2 " " "
Battery to Port Newark	1½ " " "

Pilotage

When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her

own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom.

[fol. 87] RESPONDENT'S EXHIBIT D

[Billhead of Dalzell Towing Company, Inc.]

Bills sent to Sun Co., New York, October 16, 1923. SS "Sabine Sun" and Owners. Charge No. 7729

1923.

Oct. 11.	Services of tugs running to Pier 5, Bayonne with orders to assist steamer to West Side Pier 2, Tide Water. When tugs arrived alongside they were informed vessel was not ready: Tugs: "Lloyd H. Dalzell", "G. H. Dalzell", "Dalzellea", 7:30 to 9 AM—1½ hours @ $12.50—$18.75—3 tugs	$56.25
11.	Services standing by waiting 1 hour for vessel to finish unloaded cargo and towing from Pier 5, Bayonne to West side Pier 2, Tide Water Dock (no steam): Tugs: "Dalzellea", "C. P. Raymond", "G. H. Dalzell", "Lloyd H. Dalzell," 11:30 to 3 PM—2½ hours @ $12.50—$43.75—4 tugs	175.00

14. Towing from Pier 2, Tide Water Docks, Bayonne to Staten Island (Light, steam): Tugs: "E. T. Dalzell", "Fred B. Dalzell", "Dalzelline",		
3 tugs at $30.00	$90.00	
Sunday rate ½ additional	45.00	
		135.00
		$366.25

When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom.

[fol. 88] RESPONDENT'S EXHIBIT E

Sun Oil Company

Marcus Hook, Pa., December 27, 1923.

Dalzell Towing Company, New York, New York.

GENTLEMEN: In checking your invoices of various times we note you have charged us for docking our ships at Tidewater Plant $30.00 per tug and one half time for Sundays. At the Standard Oil Co., Constable Hook you have charged $22.50 and one quarter extra for Sunday. Will you kindly explain these rates and if possible send us a schedule of your rates for doing this class of work in and around New York.

Yours very truly, Newlin Carr, Sun Oil Company.

NC/GR.

[fol. 89] RESPONDENT'S EXHIBIT F

December 28, 1923.

Sun Oil Company, Marcus Hook, Pa.

Attention Mr. Newlin Carr

GENTLEMEN: We acknowledge receipt of your favor of December 27th with reference to invoices from our Company for docking charges on your ships.

We assume that the item which you refer to at Constable Hook has been billed by us to the Standard Oil Company of New Jersey in error under an old contract which we have had with this Company and which expires on the 31st of this month.

We enclose herewith copy of our tariff rates and all our bills should conform with this tariff.

Yours very truly, Dalzell Towing Company, Inc.
—— ——, Vice-President.

FBD:EL.

[fol. 90] RESPONDENT'S EXHIBIT G

Sun Oil Company

Marcus Hook, Pa., June 6, 1924.

Dalzell Towing Company, 21-24 State Street, New York, N. Y.

GENTLEMEN: I am in receipt of your invoice of May 29, 1924, in reference to towage on the SS "Delaware Sun" and wish to call your attention to the fact, on May 27th this ship was tied up at dock at Constable Hook at 5:30 P. M. which would indicate that one-half hour over time rate was all that should have been charged against this item. On May 28th we note that you have charged one and a half hours over time for three tugs and wish to call your attention to the fact that the tugs were ordered for this ship at 4:00 P. M. and only two tugs arrived at dock. The third tug did not arrive until 5:30 P. M. when the ship was taken from the pier to stream.

In the meantime we are holding your invoice awaiting credit that we might pass same for payment.

Yours truly, L. A. Turnbull, Sun Oil Company.

LT/GCR.

[fol. 91] RESPONDENT'S EXHIBIT H

[Billhead of Dalzell Towing Company, Inc.]

Bills Sent to Sun Oil Co. New York May 29, 1924. SS. "Delaware Sun" and Owners. Charge No. 12065

1924.			
May 27.	Towing from anchor off Staten Island to East side Pier 5, Constable Hook:		
	Tugs: "Lloyd H. Dalzell", "Fred B. Dalzell", "Dalzelline", 3 to 6:15 P. M.—3¼ hours @ $12.50—1 tug	$40.62	
	2 additional tugs assisting to berth—2 tugs @ $30.00.	60.00	
	Overtime rate after 5 P. M. —1¼ hrs. @ $6.25 7.81—3 tugs	23.43	
			$124.05
28.	Towing from East side Pier 5, Constable Hook to Staten Island (Light, steam):		
	Tugs: "Dalzelline", "Fred B. Dalzell Jr.", "Fred B. Dalzell", 3 tugs @ $30.00.	90.00	
	Overtime rate after 5 P. M. —1½ hours @ $6.25—9.37 —3 tugs	28.11	
			118.11
			$242.16

When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her

own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom.

[fol. 92] RESPONDENT'S EXHIBIT I

June 10th, 1924.

Sun Oil Company, Marcus Hook, Pa.

Att. Mr. L. A. Turnbull

GENTLEMEN: We beg to refer to your favor of the 6th inst. concerning our bill for towage services rendered the SS. "Delaware Sun" on May 27th and 28th respectively, and we note that there is a question in your mind concerning the time originally billed you.

In reply we wish to advise that on May 27th we finished docking the above mentioned steamer at 5:30 P. M. which is your contention, and rendered you an invoice for the three tugs to 6:15 P. M. The additional ¾ of an hour added to our invoice covers the running time of the tugs back to the Battery Landing, which charges is in accordance with our towage schedule. For your information, we are attaching one of our schedules herewith.

With reference to our charge of the 28th for undocking the steamer at Pier 5, Constable Hook, we wish to say that when you originally called our Mr. Sullivan to Place the order with him, you asked to have the boats there at 4 P. M. Our Mr. Sullivan accepted the order for this time but after talking to one of our captains who was in the vicinity of the "Delaware Sun", he was informed that there [fol. 93] was another ship in the same slip with your steamer and it, therefore, would be impossible to take the vessel out until dead slack water, which was about 6 P. M. Our Mr. Sullivan informed our Capt. Maclary of the Dal-

zelline to run into the pier and inform you of this, which the writer understands he did. To the best of our recollection, you called us again in reply to this and advised us of the importance of the vessel sailing as near 4 o'clock as possible.

At the time the order was accepted we had no means of knowing whether there was another ship in the same slip with the "Delaware Sun" inasmuch as we do not do the business for the owners of this other vessel. In any event, it was absolutely impossible to take your ship out at that time without doing serious damage and the tugs were, therefore, obliged to wait until 5:30 P. M., at which time they started her out, and which was about 15 or 20 minutes before dead slack water. Our Captains took the ship out under protest at that time, but merely did so upon our orders.

We believe that in view of the above explanation, you will agree with us that our charge is entirely satisfactory.

Yours very truly, Dalzell Towing Company, Inc.
—— ——, Treasurer.

LHD—G.
Encl.

[fol. 94] RESPONDENT'S EXHIBIT J

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

SUN OIL COMPANY, Libelant,

against

DALZELL TOWING COMPANY, INC., Respondent; Steamtugs "Dalzellite", "W. F. Dalzell", and "Fred B. Dalzell, Jr."; Fred B. Dalzell, Claimant

It is hereby stipulated and agreed between Sun Oil Company, libelant, and Dalzell Towing Company, Inc., respondent, and Fred B. Dalzell, claimant, by their respective proctors, for the purposes of the trial of this suit, that on May 15, 1925, Archibald J. Fulton, Jr., a civil engineer attached to the United States Army Engineers at New York, in the performance of his official duties as such engineer, boarded the S. S. Sabine Sun while she was lying aground in the

vicinity of Bergen Point, New Jersey, for the purpose of locating her position. At 4:00 P. M. on said date said engineer, Archibald J. Fulton, Jr., from the stem of the Sabine Sun, took a number of sextant angles of shore stations used [fol. 95] by the United States Army Engineers and entered them, together with other data which he observed, in a report which he made to the District Engineer, a true copy of which report consisting of two pages is hereto annexed.

Dated New York, January 28th, 1930.

Duncan & Mount, Proctors for Sun Oil Company.
Burlingham, Veeder, Fearey, Clark & Hupper, Proctors for Dalzell Towing Company, Inc., and for Fred B. Dalzell.

May 15, 1925.

Subject: Grounding of SS. Sabine Sun

To the District Engineer:

The tanker Sabine Sun owned by Sun Oil Co. loaded with petroleum and bound for Texas dock, Bayonne, N. J., ran aground in Newark Bay vicinity of Bergen Point light at 3:28 P. M. this date.

Ship at time of grounding was drawing 24'.0 even keel and the tide was 4.8. Hull was pierced by rock at forward tank starboard side at a point 69' aft of stem.

Cargo was pumped from Sabine Sun into tank barges of Texas Oil Co. and ship floated and proceeded to Texas dock at 7:00 P. M.

Sextant angles taken at stem of ship were:

Sextant Angles Taken at Stem of SS. Sabine Sun, 4:00 P. M. May 15, 1925

[fol. 96] Zero on Sta. Laboratory observe Station Linseed ..... 37°—07'
Zero on Station Linseed observe Station Varnish, 1925 ..... 43°—47'
Zero on Station Varnish, 1925, observe Station T. & D. ..... 74°—28'
Zero on Station T. & D. observe Station Shooters ..... 25°—27'
Course or direction of ship:
Zero on Bergen Point Light observe center line of ship, i. e. stack ..... 108°—18'

A. J. Fulton, Jr.

[fol. 97] STIPULATION AS TO RESPONDENT'S EXHIBIT K

[Title omitted]

It is hereby stipulated and agreed by and between the proctors for the respective parties hereto, that the following exhibit need not be printed in the record on appeal herein, and may be produced and used on the argument of the appeal as though printed in the apostles; Exhibit K—Blueprint chart of Kill von Kull.

Dated New York, June 30, 1931.

Duncan & Mount, Proctors for Libelant. Burlingham, Veeder, Fearey, Clark & Hupper, Proctors for Respondent and Claimant.

[fol. 98] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION

KNOX, D. J.:

The trial of this suit developed the following state of facts:

On May 15, 1925, the steamship Sabine Sun, laden with oil, was off Stapleton, Staten Island. She was desirous of delivering the cargo at the dock of Texas Oil Company, at Bergen Point, New Jersey. On the preceding day, Leopold A. Turnbull, Assistant Marine Superintendent of Sun Oil Company, in the ordinary course of his duties, had telephoned to respondent, and requested that tugs be sent to the Sabine Sun to take her to Bergen Point. Realizing that the waters leading to that destination were shallow at certain points, the libelant's representatives told respondent that the vessel would be lightered so as to bring her [fol. 99] draft to twenty-four feet. When this had been done, the tug W. F. Dalzell proceeded alongside the steamer. The tug captain went upon the steamer's bridge to act as pilot. The tanker, using her own steam, accompanied by the tug, got under way. When the vessels were opposite St. George, they were joined by the tug Dalzellite. The three boats then proceeded through the Kill von Kull,

and off Port Richmond, the tug Fred B. Dalzell, Jr., became a part of the flotilla. Her Master, Howard B. Fort, ascended the bridge of the Sabin Sun to assume the role of pilot, relieving Captain Bennett of the W. F. Dalzell, who, nevertheless, remained on board. Turnbull, the captain of the tanker, his third officer, and a quartermaster were also there. The weather was clear, the tide was within an hour of high water, and the wind was such that it played no part in subsequent events.

In passing, it should be observed that Fort, in order to equip himself with knowledge of conditions existing along the channel through which the steamer was to go, and which was in process of being dredged, and which was also unmarked with the usual aids to navigation, had visited the locality on the previous day, and taken soundings of the depths of water through which the steamer was to move. He had also communicated with the engineers of the War Department, in an endeavor to procure a blue print of the work then in progress. This he secured. He also bought a copy of the latest chart of the waters. These aids, it is said, were not of a character to furnism him with accurate knowledge of what he might expect to find. As a result, [fol. 100] Fort was apprehensive of his ability to get the vessel to her destination in safety. In fact, he states that he explained the difficulties of the situation to Turnbull, and that had the latter not remarked that he would "take the risks", and would be very much pleased if the job were executed as well as when it was last performed, he, (Fort) would have returned the ship to anchorage. Turnbull denies that any such conversation occurred. Whatever may be the truth as to this feature of the case, the tanker, using her own steam, with a tug on either quarter, and one forward on the port side, proceeded on her way. In navigating the vessel, Fort took his ranges from a gas tank and a street end on Staten Island that he had used successfully on former occasions when taking vessels into Newark Bay. On this trip, however, as he was rounding about Bergen Point, on an angle of 90 degrees to starboard, the forward part of the Sabine Sun struck against some obstruction, and went fast aground. She so remained for about three hours, during which time she was lightened of a part of her cargo. When this had been accomplished, the vessel floated and, under the pilotage of

Captain Fountain, who was brought aboard, was taken to her dock. The grounding of the vessel injured some of her plates, and this suit is designed to recover the resultant damages.

Captain Fountain testifies that when he went on board the steamer, she was out of the channel and I so find. When Fountain took charge and the steamer had been floated, he backed her into the Kill von Kull, and then maneuvered in such fashion that the turn in the channel, which Fort had apparently missed, was made without trouble. On [fol. 101] reaching the dock of the Texas Oil Company, Fountain returned the vessel to Fort, who warped her into the berth.

Upon the facts as they have been recited, it is clear that libelant can have no recovery against the tugs, or any of them. None of them contributed to the accident in any way, shape or form. For this reason, each of them must be exonerated. The Edward G. Murray, 278 Fed. 895.

But, as for the respondent's part in the occurrence, somewhat different considerations must receive attention.

The first of these is that the representative of the owners of libelant, paid, or rather gave, the sum of fifteen dollars to Fort upon the completion of his work in handling the vessel. This payment, I think, should be regarded as a mere gratuity, and in no way determinative of the question of respondent's liability in the premises. See The Edward G. Murray, supra, and The Procida, 243 Fed. 251.

So far as the conversation, in which Fort says that Turnbull assumed the risks incident to the navigation of the Sabine Sun, is concerned, I am of the belief that it should not, granting that it took place, affect the question of liability. There is an element of the case that renders Fort's disclaimer of responsibility, if he actually made it, more or less academic. It is that respondent's engagement with respect to the Sabine Sun was qualified by a clause appearing upon its rate sheet, and bills for services, which reads as follows:

"When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use [fol. 102] of her own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain

or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom."

Copies of respondent's "Pro Forma Towage Rates and Contract with Dalzell Towing Company, Inc.", containing the above quoted clause, were forwarded to libelant's office on November 15, 1923, December 28, 1923 and June 10, 1924, in response to inquiries concerning towage charges. One of such copies was received by Mr. Innis, a clerk in libelant's office; another by the office manager of libelant's marine office; and a third by Mr. Turnbull himself. In a letter which accompanied the rate schedule which was sent to libelant and received by Innis, the respondent said:

"We are attaching herewith a towage schedule and would like to call your attention to the last paragraph marked with an 'X'."

This reference was to the pilotage clause set out above.

Respondent usually handled the vessels of libelant in this port, and inasmuch as the pilotage clause is printed on the bills for services rendered by respondent, to say [fol. 103] nothing of the attention which was drawn to the clause by respondent's letter, there can be no doubt that libelant should be charged with knowledge of the terms on which respondent offered to furnish towing services. So far as appears, libelant never informed respondent that it would not accept towage services on the terms proposed, as was the fact in McWilliams Bros., Inc. vs. Davis, Director General, 285 Fed. 312. Nor was the existence of the pilotage clause only brought to the attention of a superannuated and inactive employee of the respondent, as was done in G. Robitzek & Bro., Inc. vs. Davis, Director General, 296 Fed. 107. On the contrary, the responsible officials had every opportunity to know of the limitation contained in the terms of respondent's offer to undertake engagements such as it assumed for libelant. While Turnbull denies that he had ever actually read the clause prior

to the trial, he does admit that he had "heard of it". The facts here present bring the case within the rule of law as announced by the Circuit Court of Appeals in this circuit in The Oceanica, 170 Fed. 893; in Ten Eyck vs. Director General, 267 Fed. 974, and in The Cutchogue, 10 Fed. (2d) 671, to the effect that under circumstances such as those now before me, the tow assumed the risk of injury. The principle of these cases must here be recognized. Appreciation is had, of course, of the circumstance that the law of this circuit on the question now before me is not in harmony with that followed by the Appellate Courts of several other circuits, and may indeed be in conflict with the pronouncement of the Supreme Court in The Syracuse, 12 Wall. 167. It is true, nevertheless, that the latter court [fol. 104] refused to review the Ten Eyck case, supra, and there is nothing which indicates that the Appellate Court of the Circuit is inclined to change its previous rulings on the question. Until that change be made, I shall follow the law as it has been here repeatedly declared. As for the contention that the Supreme Court cited its decision in The Syracuse as a basis of its conclusion in The Wash Grey case, 277 U. S. 66, it needs only to be remarked that the facts recently before the court in that litigation are easily and fundamentally distinguishable from those in the case at Bar.

From what has been said, it would seem as though libelant cannot escape the binding effect of the decisions of the local Circuit Court of Appeals, to which reference has been made, even though it be assumed that Fort was guilty of negligence in getting the Sabine Sun out of the channel and on to the ground. By reason of my conclusion, I need make no finding on the question of Fort's negligence.

The libels are dismissed.

November 25th, 1930.

—— ——, U. S. D. J.

[fol. 105] In United States District Court

[Title omitted]

Order of Findings and Conclusions

Counsel for the respective parties herein being unable to agree on the facts of this case, and I having specially found

the facts necessary to a decision of the case and stated such findings in my opinion herein, and I having separately stated in said opinion my conclusions of law on the facts so found,

Now, therefore, I do hereby order:

1. That the opinion filed herein on November 25, 1930, be, and it hereby is made, my findings of fact and conclusions of law in this case, and that it be entered of record as and for such findings and conclusions.

2. That said findings and conclusions constitute the formal decision in this case, and a final decree in accordance therewith may be entered herein on proper notice to the proctors for the libelant.

Dated New York, February 5th, 1931.

Jno. C. Knox, U. S. D. J.

[fol. 106] In United States District Court

[Title omitted]

Final Decree—Feb. 17, 1931

The above entitled cause having duly come on to be heard on the pleadings and proofs adduced by the respective parties and having been argued by advocates for the respective parties and due deliberation having been had thereon and the Court having made its findings of facts and conclu-
[fol. 107] sions of law and filed its opinion in writing, dated November 25, 1930, dismissing the libel with costs and the costs of the respondent having been duly taxed at $58.21 and the costs of the claimant having been duly taxed at $276.21,

Now, on motion of Burlingham, Veeder, Fearey, Clark & Hupper, proctors for respondent and claimant herein, it is

Ordered, adjudged and decreed that the libel herein be, and the same hereby is, dismissed as against respondent, Dalzell Towing Company, Inc., with costs; and it is further

Ordered, adjudged and decreed that the libel herein be, and the same hereby is, dismissed as against the steamtugs

"Dalzellite", "W. F. Dalzell" and "Fred B. Dalzell, Jr.", with costs; and it is further

Ordered, adjudged and decreed that the respondent, Dalzell Towing Company, Inc., recover of and from the libelant, Sun Oil Company, and/or its stipulators the sum of $58.21, costs as taxed with interest from the date of entry of this decree until paid and that respondent have execution therefor; and it is further

Ordered, adjudged and decreed that the claimant, Fred B. Dalzell, recover of and from libelant, Sun Oil Company, and/or its stipulators the sum of $276.21, costs as taxed with interest from the date of entry of this decree until paid and that claimant have execution therefor; and it is further

[fol. 108] Ordered that unless an appeal be taken from this decree within ten (10) days after the service of a copy thereof with notice of entry upon the proctors for the libelant, the libelant and/or the stipulators for costs on the part of the libelant do cause the engagements of their respective stipulations to be performed, execution may issue against the goods, chattels, lands and tenements and other real estate to enforce satisfaction of this decree.

William Bondy, U. S. D. J.

[fol. 109] In United States District Court

[Title omitted]

Notice of Appeal

Sirs: Please take notice that the libelant, Sun Oil Company, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from so much of the final decree, entered herein February 17, 1931, as adjudges and decrees that the libel herein be dismissed as against the respondent, Dalzell Towing Company, Inc., with costs, and that the respondent recover of and from the libelant and its stipulators the respondent's costs as taxed, in the sum of

[fol. 110] Fifty-eight and 21/100 Dollars ($58.21), and that respondent have judgment and execution therefor.

Dated New York, April 20, 1931.

Yours, etc., Duncan & Mount, Proctors for Libelant. Office and P. O. address: 27 William Street, New York City.

To Messrs. Burlingham, Veeder, Fearey, Clark & Hupper, Proctors for Respondent, 27 William Street, New York City; Charles Weiser, Esq., Clerk.

WOOLSEY:

The above appeal is hereby allowed.

[fol. 111] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

The libelant Sun Oil Company hereby assigns error in the findings, decision and final decree of the District Court in the following respects:

First. In that the court dismissed the libel as against respondent Dalzell Towing Company, Inc.

Second. In that the court did not grant a decree for the libelant against the respondent Dalzell Towing Company, Inc.

Third. In that the court held that the respondent Dalzell Towing Company, Inc. was not liable for the grounding of the SS. "Sabine Sun" on May 15, 1925.

[fol. 112] Fourth. In that the court held that there was a valid contract between the libelant and the respondent Dalzell Towing Company, Inc., by which it was agreed that respondent would not be liable for any negligence of its tug captain while he was acting as pilot of the SS. "Sabine Sun".

Fifth. In that the court failed to hold that said contract was illegal and void.

Sixth. In that the court, although recognizing the conflict between its decision and that of the United States Supreme Court in The Syracuse, 12 Wall. 167, failed to follow the rule laid down by the Supreme Court.

Seventh. In that the court failed to find that there was no express contract between the libelant and the respondent in regard to the tug captain who went on the SS. "Sabine Sun" as pilot.

Eighth. In that the court held that the libelant should be charged with knowledge that the respondent offered to furnish towage services only on terms which included the pilotage clause.

Ninth. In that the court held that the libelant and SS. "Sabine Sun" assumed the risks of injury during the respondent's towage service.

Tenth. In that the court failed to hold that the respondent's tug captain, who was on board the SS. "Sabine Sun" as pilot, was respondent's servant.

Eleventh. In that the court, although finding that the SS. "Sabine Sun" grounded outside the channel, failed to [fol. 113] find that she grounded through the negligence of respondent's tug captain.

Twelfth. In that the court held that respondent's engagement was qualified by a clause appearing on its bills for service.

Thirteenth. In that the court held that the pilotage clause, appearing on respondent's rate schedule, was a part of the towage contract and was a condition to respondent's offer to tow.

Fourteenth. In that the court held that libelant, by engaging respondent's towage services and allowing respondent's tug captain to go on the "Sabine Sun" as pilot, assumed the risks of the towage.

Dated New York, April 20, 1931.

Duncan & Mount, Proctors for Libelant.

[fol. 114] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the District Court in the above entitled matter as agreed on by the parties.

Dated New York, July 7, 1931.

Duncan & Mount, Proctors for Libelant. Burlingham, Veeder, Fearey, Clark & Hupper, Proctors for Respondent and Claimant.

[fol. 115] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 116] In United States Circuit Court of Appeals for the Second Circuit, October Term, 1931

No. 114

Argued December 23, 1931

Sun Oil Company, Libelant-Appellant,

v.

Dalzell Towing Company, Inc., Respondent-Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

Opinion—January 11, 1932

Libel in admiralty by Sun Oil Company against Dalzell Towing Company, Inc., and three tugs owned by it to recover for damages alleged to have been caused to libelant's steamship by negligent towage. From a final decree dis-

missing the libel, the libelant has appealed. Decree affirmed.

Duncan & Mount, of New York City (Frank A. Bull, of New York City, of counsel), for appellant.

Burlingham, Veeder, Fearey, Clark & Hupper, of New York City (Chauncey I. Clark and P. Fearson Shortridge, both of New York City, of counsel), for appellee.

SWAN, Circuit Judge:

In May, 1925, the respondent was employed by the libelant to take its steamship Sabine Sun from Staten Island to Bergen Point, N. J. While proceeding through the Kill von Kull, accompanied by three of respondent's tugs, the captain of one of which was on the bridge of the steamer in the role of pilot and directing her helm and engine movements, the steamer grounded at a point which the District Court found to be outside the channel. To recover the damages thus sustained this suit was brought. The Sabine Sun was proceeding under her own steam, and the tugs were exonerated because none of them contributed in any way to the grounding. The appellant has assigned no error to the dismissal of the libel as to them. The respondent also was exonerated, on the ground that its contract of employment put the risk of the tug captain's alleged negligence (assuming that he was negligent) upon the tow. This ruling the appellant vigorously attacks. Two questions are presented: (1) Whether the contract did contain a provision putting the risk on the tow; and (2), if it did, whether such a provision is valid.

The contract was oral, and, as is usual in towage cases, consisted merely of an order telephoned by the tow owner and accepted by the tug owner, so that the full terms of the contract must be spelled out by the court from the previous dealings of the parties. On May 14, 1925, Mr. Turnbull, the assistant marine superintendent of Sun Oil Company, called the office of Dalzell Towing Company by telephone, and requested that on the following day they take the Sabine Sun from Stapleton to the dock of the Texas Oil Company at Bergen Point. The respondent's agent replied that they would be ready to take her about 1:30 p. m. That was all of the conversation. Nothing was said about pilot-

age, but Mr. Turnbull understood that his vessel would move under her own steam and that one of the tugboat captains would come upon her bridge and take charge as pilot. The parties had previously done business together, and on three prior occasions the respondent had mailed to the libelant a printed document entitled, "Pro Forma Towage Rates and Contract with Dalzell Towing Company," which contained a final paragraph reading as follows:

[fol. 117] "Pilotage

"When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom."

This had been sent to libelant's Philadelphia office on November 15, 1923, with a letter calling special attention to the pilotage clause. A second copy was sent to libelant's office at Marcus Hook, Pa., on December 28, 1923, and a third copy was again sent to that office on June 10, 1924. In letters accompanying the two copies last mentioned, reference was made by respondent to its schedule of towage rates, and it was asserted that bills which were being questioned by the libelant were in accordance therewith. The correspondence of June, 1924, was with Mr. Turnbull himself, who admitted that he had before him at the time a bill of respondent upon the face of which is printed the pilotage clause. Another bill bearing the same clause was also put in evidence, and Mr. Turnbull testified that he saw such bills "right along" and had "heard of" the pilotage clause, although he denied that he had ever actually read it until asked to do so at the trial. Whether he had actually read the clause and whether it was in his mind when he telephoned the order for tugs for the Sabine Sun is quite

beside the point. The meeting of the minds of the parties to a contract is not determined by a subjective test. Mr. Turnbull's offer on behalf of the libelant, which the respondent accepted, must be interpreted in the sense in which the party using the words should reasonably apprehend that they would be understood by the other party. 2 Williston, Contracts, § 605. Knowing that the respondent had a schedule of rates and a pilotage clause, the importance of which had been stressed not only in the letter of November 15, 1923, but also by printing it on its billheads, the libelant should reasonably apprehend that its telephone order for tugs would be understood by respondent as a request that they be furnished upon its customary terms as to rates and pilotage. The court below rightly held that the contract between the parties included the pilotage clause as one of its terms. See Ten Eyck v. Director General, 267 F. 974 (C. C. A. 2); The Cutchogue, 10 F. (2d) 671 (C. C. A. 2); Graves v. Davis, 235 N. Y. 315, 139 N. E. 280. Cases relied upon by the appellant are distinguishable, for in them the tug owner's notice was not shown to have been received by any responsible agent of the owner of the tow. See McWilliams Bros. v. Davis, 285 F. 312 (C. C. A. 2); G. Robitzek & Bros. v. Davis, 296 F. 107 (C. C. A. 2); Calzavaro v. Planet S. S. Corp., 31 F. (2d) 885 (C. C. A. 4).

The appellant argues that, even if the pilotage clause was a term of its contract with respondent, the case at bar was not brought within it, but the argument is wholly without merit. It is mentioned merely to indicate that it has not been overlooked.

We pass to the contention that the pilotage clause is invalid in so far as it attempts to put upon the tow the risk of the tug captain's negligence while acting as pilot of the vessel as she proceeded under her own power. The authorities relied upon are a statement of Mr. Justice Davis in The Syracuse, 12 Wall. 167, 171, 20 L. Ed. 382, and a recent decision by the late Chief Justice Taft in which that language was repeated. Compania de Navegacion v. Fireman's Fund Ins. Co., 277 U. S. 66, 73, 48 S. Ct. 459, 72 L. Ed. 787 (for convenience hereafter referred to as The Wash Gray). After an elaborate consideration of the question, this court decided that an agreement by the tow to

assume all risks was effectual to release the tug from liability for its negligence, because a tug is not a common carrier in its relation to the tow. The Oceanica (C. C. A.) 170 F. 893. Judge Ward's comments on the meaning of Mr. Justice Davis' statement in The Syracuse, and the reasons advanced for thinking it not controlling upon this court need not be here repeated. The authorities have been collected and ably discussed in the Pacific Maru, 8 F. (2d) 166 (D. C. S. D. Ga.). Many have reaffirmed the rule laid down in The Oceanica, and it has become so firmly established in this circuit and rests, as it seems to us, upon reasoning so sound, that we should not think of departing from it unless the later Supreme Court case clearly demands it. That question, however, is not now presented, [fol. 118] for the decision in The Wash Gray is clearly distinguishable, in our opinion, from the case at bar.

The Wash Gray did not involve a pilotage clause. It was a case in which a steamship contracted to tow a tugboat (The Wash Gray) from Tampico to Galveston under a contract which provided that the steamer "is not responsible in any way for loss or damage to" the tow. The tow was lost at sea, and in a suit against her hull underwriters a defense was interposed that the release of the towing vessel, undisclosed to the underwriters, vitiated the insurance. In holding that it did not, Chief Justice Taft said that the contract did not release the towing vessel from liability for negligence of its master or crew, and quoted from The Syracuse. Whether the opinion he read as meaning that the contract as drawn should be construed as not intended to embrace negligence (as the appellee contends) or as meaning that a contract which attempts to release a towing vessel from liability for negligence is invalid (as the appellant contends), it does not, upon either alternative, control decision of the problem before us. If the opinion lays down only a rule of construction, it is too clear for argument that it does not apply to the pilotage clause in suit which indubitably expresses the intention to put upon the "assisted vessel" the risk of the pilot's handling of her. If, on the contrary, the opinion lays down the rule that a towing vessel cannot release herself from liability for negligence, however clearly that intention be expressed in the contract of towage, a distinction may well be taken between a towage con-

tract as such and a pilotage contract. When a tug owner is engaged in towing a dead vessel, he may limit his liability to the value of his tug. It is conceivable (although we should not so decide unless constrained by controlling authority) that, having granted the privilege of limited liability, the law forbids a towing company from gaining complete exemption from liability if the tug is at fault. But when the "assisted vessel" is under her own power and the towing company merely supplies a tug master as a pilot, there is no maritime lien upon the tug for the errors of the pilot. [The Sarnia, 261 F. 900 (C. C. A. 2)] and no limitation of liability of the tug owner. We can conceive of no reason why the person who merely supplies a pilot should not be able to say to the vessel-owner: "I will furnish a man believed to be competent but you must assume the risk of his errors." If this cannot be done, the piloting company may readily be wiped out by a single disaster. Believing that The Wash Gray opinion does not preclude a decision that the pilotage clause in question is valid, we affirm the holding of the District Court to that effect. This makes it unnecessary to consider whether or not Captain Fort was in fact negligent in stranding the vessel.

Decree affirmed.

[fols. 119 & 120] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

DECREE—Jan. 18, 1932

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 121] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 122] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed May 23, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.